TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931 1932

No. 404 3

AMERICAN SURETY COMPANY OF NEW YORK,
PETITIONER,

vs.

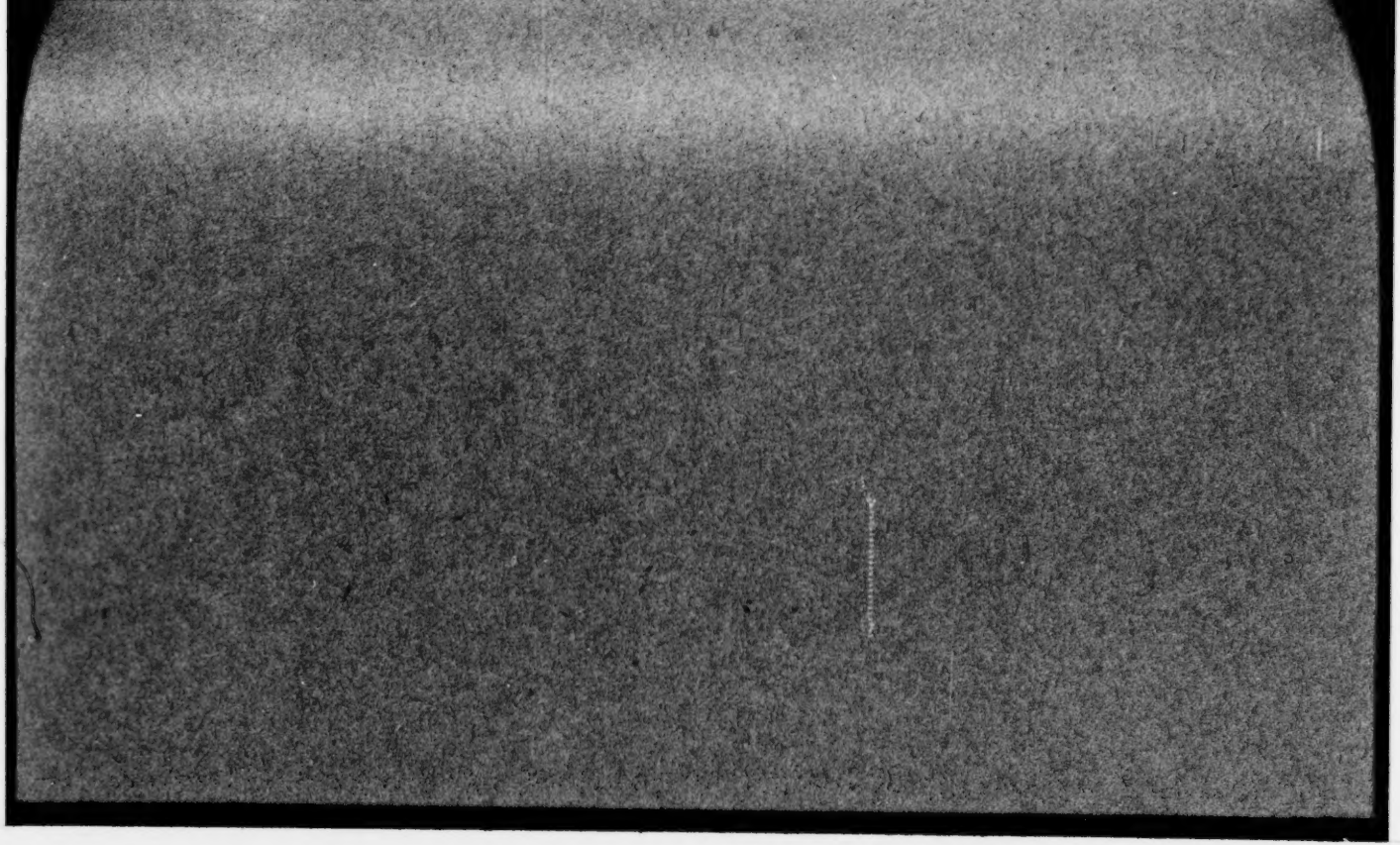
VIVIAN F. BALDWIN AND E. R. BALDWIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR CERTIORARI FILED OCTOBER 30, 1931

CERTIORARI GRANTED APRIL 25, 1932

(36,308)



(36,308)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 494

AMERICAN SURETY COMPANY OF NEW YORK, PETITIONER,

vs.

VIVIAN F. BALDWIN AND E. R. BALDWIN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1932

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Judgment.

1

IN THE

District Court of the Third Judicial District of the State of Idaho

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

vs.

2

SINGER SEWING MACHINE COMPANY, a corporation, and ED. ANDERSON,
Defendants.

The plaintiffs in the above entitled cause having heretofore filed their complaint herein and the defendants and each of them having thereafter appeared and filed respectively their separate answers to said complaint; and thereafter, on the 3
21st day of May, 1928, said cause having come on for trial of the issues so made up; and the jury having been duly impanelled and sworn to try said cause, and thereupon plaintiffs and defendants having offered evidence both oral and documentary in support of their respective allegations, and the said jury having been duly instructed by said court and having heard argument by the respective counsel of record of said parties herein, and having thereupon retired to consider of their verdict;

Judgment.

And the said jury having thereafter returned to court and having returned in said cause their verdict, which was duly read and filed herein, in the following language to-wit:

> We, the jury, in the above entitled cause find for the plaintiffs, Vivian F. Baldwin and E. R. Baldwin and against the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson in the sum of $19,500.00.
>
> J. E. BURNETT,
> Foreman.

No. 11860—Filed 5:22 P. M. May 25, 1928.

STEPHEN UTTER,
Clerk.

By: B. CLYDE EAGLESON,
Deputy.

Now, THEREFORE, it is hereby ordered, adjudged and decreed that the said plaintiffs, Vivian F. Baldwin and E. R. Baldwin, do have and recover from the said defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars together with plaintiffs' costs in this behalf laid out and expended, which are hereby taxed at the sum of $.

CLINTON H. HARTSON,
District Judge.

(Endorsed: Filed May 31st, 1928.)

7

Notice of Appeal.

[TITLE OF COURT AND CAUSE.]

To Vivian F. Baldwin and E. R. Baldwin, Plaintiffs, James F. Ailshie, Jr., and J. R. Smead, their attorneys, and to Stephen Utter, Clerk of the above entitled Court:

You and each of you will please take notice, that the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, hereby appeal to the Supreme Court of the State of 8
Idaho, from that certain judgment entered in the above entitled action on the 31st day of May, 1928, for the sum of $19,573.70, against the defendants, and each of them, and from the whole thereof.

Dated August 27, 1928.

MARTIN & MARTIN,
and
H. B. WALKER,
Attorneys for Defendants.
Residence: Boise, Idaho. 9

(Duly served.)

(Endorsed: Filed August 27th, 1928.)

10

Undertaking on Appeal.

[TITLE OF COURT AND CAUSE.]

Whereas the defendants, Singer Sewing Machine Company, a corporation, and Ed. Anderson, in the above entitled action have appealed to the Supreme Court of the State of Idaho from that certain judgment made and entered into in the above entitled case on the 31st day of May, 1928, in favor of the plaintiffs and against these defendants, and each of them, in said above entitled
11 action in the above entitled court, said judgment being in favor of said plaintiffs in the sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, and against said defendants and each of them:

Now, THEREFORE, the American Surety Company of New York, a foreign corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal, does hereby undertake and promise on the part of said appellants, Singer Sewing Machine
12 Company, a corporation, and Ed. Anderson, that the said appellants will pay all damages and costs which may be awarded against them on appeal or on dismissal thereof not exceeding Three Hundred ($300.00) Dollars, to which amount the said American Surety Company acknowledges itself duly bound.

IN WITNESS WHEREOF, the said American Surety Company has caused its name and seal to

be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOWARD E. STEIN,
Attorney-in-Fact.

Countersigned:
HOWARD E. STEIN,
Agent at Boise, Idaho.

Countersigned:
RICHARD & HAGA
O. O. HAGA.

(SEAL)

(Endorsed: Filed August 29th, 1928.)

16

Undertaking on Appeal.

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

17

vs.

SINGER SEWING MACHINE COMPANY, a corporation, and ED. ANDERSON,
Defendants.

Whereas, the defendant, Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court
18 of the State of Idaho from the judgment made and entered against it in the above entitled action and in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred and Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment;

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to

be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

AMERICAN SURETY COMPANY OF NEW YORK,

By HOWARD E. STEIN,
Attorney-in-Fact.

Countersigned:

HOWARD E. STEIN,
(SEAL) Agent at Boise, Idaho.

Countersigned:

RICHARDS & HAGA,
O. O. HAGA.

It is hereby agreed that the within bond is hereby accepted insofar as the amount is concerned without regard to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29th day of August, 1928.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho.

(Endorsed: Filed August 29, 1928.)

25

Order for Reporter's Transcript.

[Title of Court and Cause.]

To J. A. Weaver, Official Court Reporter of the above entitled court:

It appearing to the judge of the above entitled court that the defendants in the above entitled cause have appealed to the Supreme Court from the judgment made and entered in the above entitled cause on May 31, 1928, and that they have made an application to this court for an order directing the court reporter to prepare a transcript of all the testimony and proceedings in said cause as required by law,

26

Now, therefore, you are hereby ordered and directed to forthwith prepare and lodge with the clerk of this court within ninety days of the receipt of this order a transcript of all the testimony and proceedings in this cause as required by law.

Done and dated in open court this 30th day of August, 1928.

27

Clinton H. Hartson,
District Judge.

28

Praecipe.

[TITLE OF COURT AND CAUSE.]

To Stephen Utter, Clerk of the above entitled court:

The above named defendants, Singer Sewing Machine Company, a corporation, and Ed Anderson, having appealed to the Supreme Court of the State of Idaho from that certain judgment made and entered in the above entitled court in the
29 above entitled cause on the 31st day of May, 1928, hereby request that you prepare a transcript for use on such appeal consisting of the judgment roll and of all papers constituting the same, including:

The complaint of the plaintiff;

The demurrer and motions of the defendants, and orders or minute entries showing the rulings of the court thereon and demand for change of venue to the Federal court on the part of the defendants, Singer Sewing Ma-
30 chine Company, a corporation, and Ed Anderson, together with all affidavits connected therewith;

Orders and minute entries showing the ruling of the court thereon;

The separate answers of the defendants;

The verdict of the jury and the judgment rendered thereon, and any and all papers that may be properly included in said judgment roll under the rules of the State of Idaho and the rules of the Supreme Court, and the

31

Notice of appeal;
Undertaking on appeal, and the
Reporter's Transcript hereafter to be settled in this cause, and
Copy of the Praecipe, and such other papers as are required under the laws of the State of Idaho and the rules of the Supreme Court or the rules of this Court.

You are further requested to show by your certificate to said transcript, in addition to other matters required by law to be shown therein, the date on which said Undertaking on Appeal was filed.

32

We tender you herewith $17.00 in payment of the following:

Supreme Court filing fees.....	$12.00
Clerk's fee for certifying transcript	5.00

and we also tender you in addition to the above costs the cost of preparing said transcript at the rate of 10 cents per folio.

Dated this 29th day of August, 1928.

33

MARTIN & MARTIN,
H. B. WALKER,
Attorneys for Defendants and Appellants.
Residence: Boise, Idaho.

(Endorsed: Filed August 30th, 1928.)

34

Notice of Appeal.

[Title of Court and Cause.]

To the plaintiffs, Vivian F. Baldwin, and E. R. Baldwin, and to James F. Ailshie, Jr., and J. R. Smead, their attorneys of record, and to the defendant Singer Sewing Machine Company, a corporation, and to Martin & Martin, its attorneys of record, and to Stephen Utter, Clerk of the above entitled court:

35

You and each of you will please take notice that the above named defendant, Ed. Anderson, hereby appeals to the Supreme Court of the State of Idaho, from that certain order made and entered on April 2nd, 1929, in the above entitled cause denying and over-ruling this defendant's motion to set aside the judgment entered herein and to grant a new trial to this defendant, and from the whole of said order.

Dated April 8th, 1929.

36

H. B. Walker,
Attorney for Defendant,
Ed. Anderson.
Residence: Boise, Idaho.

(Endorsed: Filed April 9, 1929.)

37

Notice of Appeal.

[TITLE OF COURT AND CAUSE.]

To the plaintiffs Vivian F. Baldwin and E. R. Baldwin, and to James F. Ailshie, Jr., Esquire, and J. R. Smead, Esquire, their attorneys of record, and to the defendant Ed. Anderson, and H. B. Walker, Esquire, his attorney of record, and to Stephen Utter, Clerk of the above entitled court:

38

You and each of you will please take notice that the above named defendant, Singer Sewing Machine Company, hereby appeals to the Supreme Court of the State of Idaho, from that certain order made and entered on April 2nd, 1929, in the above entitled cause denying and over-ruling this defendant's motion to set aside the judgment entered herein and to grant a new trial to this defendant, and from the whole of said order.

Dated this 8th day of April, 1929.

39

MARTIN & MARTIN,
Attorneys for Defendant Singer
Sewing Machine Company.
Residence: Boise, Idaho.

(Endorsed: Filed April 9, 1929.)

40

Clerk's Certificate.

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

VIVIAN F. BALDWIN, Respondent, *vs.* SINGER SEWING MACHINE CO., a Corporation, and ED. ANDERSON, Appellants.	No. 5321.

41

This cause having been heretofore heard and taken under advisement by the court, and the court having fully considered the same, on this day the decision of the court by Justice Lee, is delivered, to the effect that the judgment of the district court of the third judicial district in and

42 for Ada County be reversed as to appellant Singer Sewing Machine Company, and affirmed as to appellant Anderson. Costs awarded to appellant Singer Sewing Machine Company, in the sum of $488.35. Costs as against appellant Anderson to respondents in the sum of $40.00.

I, Clay Koelsch, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the preceding and annexed contains a true and correct copy of the original judgment entered in the

Clerk's Certificate. 43

above entitled cause, on the tenth day of April, 1930, and now on file in my office.

Witness my hand and the seal of the court this 11th day of April, 1930.

CLAY KOELSCH,
Clerk.

By EDITH J. HEARNE,
Deputy Clerk.

(Seal)

44

(Endorsed: Filed May 22, 1930.)

Judgment.

[TITLE OF COURT AND CAUSE.]

This cause coming on regularly to be heard on the 21st day of May, 1928, before the court and a jury, and a judgment being regularly and duly entered and filed on May 31st, 1928, whereby the plaintiffs were given judgment against the defendants in the sum of Nineteen Thousand Five Hundred Dollars; thereafter the said defendants having appealed to the Supreme Court of the State of Idaho, from the judgment made and entered herein, and thereafter, and on May 10th, 1930, the Supreme Court of the State of Idaho made and entered its decision in this matter reversing said judgment as to the defendant Singer Sewing Machine Company, and the remittitur of the Supreme Court having been duly issued out of the said Su- 45

46 *Judgment.*

preme Court and filed with the Clerk of this Court on May 22nd, 1930, by the terms of which it was ordered and adjudged that the judgment of the District Court made and entered as hereinabove set out against the Singer Sewing Machine Company be reversed and the cause of action dismissed as to said defendant, Singer Sewing Machine Co., and affirmed as to defendant Ed. Anderson.

Now, Therefore, in accordance with the said de-
47 cision and remittitur and in compliance therewith.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Co., and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation.

And in further compliance with said remittitur of the Supreme Court of the State of Idaho, the said defendant Singer Sewing Machine Company,
48 a corporation, is hereby given judgment against the said Vivian F. Baldwin and E. R. Baldwin for the sum of Four Hundred Eighty-eight and 55/100 Dollars ($488.55) as and for its costs incurred in the Supreme Court, together with interest thereon at the rate of seven per cent per annum from May 10th, 1930; and the said defendant, Singer Sewing Machine Company, is hereby given judgment against the said plaintiffs Vivian F. Baldwin and E. R. Baldwin for the sum of $....., its costs incurred upon the trial of this cause in the District

49

Court, making a total judgment that the said Singer Sewing Machine Company, a corporation, do have and recover of and from the said Vivian F. Baldwin and E. R. Baldwin in the sum of $.....

Done and dated in open court this 24 day of May, 1930.

DANA E. BRINCK,
District Judge.

50

(Endorsed: Filed May 24, 1930.)

51

52

Judgment.

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Plaintiffs,

53

vs.

ED. ANDERSON,
Defendant,

and

AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Surety.

54 In the above entitled cause the plaintiffs, having recovered judgment herein, on the 31st day of May, 1928, against the defendant Ed. Anderson and Singer Sewing Machine Company, a corporation, for the sum of $19,500.00 with interest at seven per cent. per annum from said date, and the said defendant Ed. Anderson and Singer Sewing Machine Company having appealed to the Supreme Court of the State of Idaho from the said judgment, and an undertaking having been executed by the American Surety Company of New York, a corporation, authorized to act as surety in the State of Idaho,

having been given to plaintiffs as respondents upon the said appeal for the stay of execution of said judgment, pending said appeal in accordance with the provisions of Section 7155, Idaho Compiled Statutes, and by which undertaking the said American Surety Company of New York, a corporation, did undertake and obligate itself to the plaintiffs herein under the said statutory obligations in the sum of $25,000.00, and having thereby obligated itself to the effect that if the said judgment so appealed from, or any part thereof, should be affirmed the said American Surety Company of New York, a corporation, would pay the amount directed to be paid by the said judgment, or part thereof which should be affirmed, and all damages and costs which should be awarded plaintiffs, and providing that upon the failure to make payment within thirty days after the filing of the remittitur from the Supreme Court in the above entitled District Court, from which said appeal was taken, judgment might be entered on motion of said plaintiffs in their favor against the said surety company, to-wit, the American Surety Company of New York, for such amount together with interest that might be due thereon, and the damages and costs which might be awarded in favor of plaintiffs upon the appeal; and said appeal to the Supreme Court of the State of Idaho by the said defendant Ed. Anderson and Singer Sewing Machine Company having been affirmed in part and reversed in part, viz.:

> "Reversed as to appellant Singer Sewing Machine Company, affirmed as to appellant Anderson."

58 *Judgment.*

and the remittitur from the Supreme Court of Idaho to the above entitled District Court having been filed in the office of the Clerk of the above entitled Court on May 22nd, 1930, and costs having been taxed in favor of plaintiffs and against the defendant Ed. Anderson in the sum of $40.00, and more than thirty days having elapsed since the filing of said remittitur from the Supreme Court in the District Court, and defendant Ed. Anderson having failed to pay the said judgment as affirmed, or any part thereof, and the plaintiffs having
59 moved the Court for a judgment against the said American Surety Company of New York, a corporation, and the court being fully advised in the premises:

DOES HEREBY ORDER AND ADJUDGE, That the plaintiffs do have and recover of and from the American Surety Company of New York, a corporation, the sum of $19,500.00, together with the sum of $2,817.21 interest thereon at the rate of seven per cent per annum from the 31st day of May, 1928, to the 23rd day of June, 1930, together with $40.00
60 costs as provided for in the remittitur of the Supreme Court of Idaho, making the total sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date hereof until paid, and that the plaintiffs have execution therefor.

Done in open court this 23rd day of June, 1930.

CHARLES F. KOELSCH,
District Judge.

(Endorsed: Filed June 23, 1930.)

61

Notice of Motion.

[TITLE OF COURT AND CAUSE.]

To the above named plaintiffs and to James F. Ailshie, Jr. and J. R. Smead, their attorneys:

YOU AND EACH OF YOU are hereby notified that on the 28th day of June, 1930, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard at the court room of the above entitled Court in Boise, Idaho, the undersigned American Surety Company of New York will move the Court 62
to vacate the judgment made and entered in the above entitled action in favor of the above named plaintiffs and against the said American Surety Company of New York on the 23rd day of June, 1930, and to stay all proceedings issued under execution upon said judgment.

Said motion will be made upon the records and files in this action, including the supersedeas bond on which said judgment is based, and the affidavit of McKeen F. Morrow. A copy of said motion, to which is attached a copy of said supersedeas bond and a copy of said affidavit of McKeen F. Morrow, 63
is hereto attached and herewith served upon you.

Dated this 26th day of June, 1930.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company
of New York, a Corporation.

64

Motion.

[Title of Court and Cause.]

Comes now American Surety Company of New York, a New York corporation, and moves this Honorable Court to vacate and set aside that certain judgment against said American Surety Company of New York, made and entered in the above entitled cause on the 23rd day of June, 1930, upon the following grounds and for the following reasons, to-wit:

65

I.

That said judgment is void in that the supersedeas bond on which said judgment is based shows on its face that it was given on the appeal of the Singer Sewing Machine Company in this action and for the purpose of staying execution against that company, that said bond did not stay or purport to stay said judgment against the other defendant, Ed. Anderson, and it appears from said judgment and the records and files in this action that the Supreme Court of Idaho reversed the judgment against said appellant, Singer Sew-

66

ing Machine Company, from which it appealed, and that upon the remittitur from said Supreme Court this Court vacated the said judgment appealed from as to Singer Sewing Machine Company, dismissed said action as against it, and entered judgment in its favor against plaintiffs herein on or about May 24, 1930.

II.

That said judgment is void in that the supersedeas bond on which said judgment is based

shows on its face that the said American Surety Company of New York executed said bond solely in consideration of the appeal by Singer Sewing Machine Company from the judgment entered herein on or about May 31, 1928, and said appeal was sustained and there has, therefore, been no breach of the condition of the bond.

III.

That the enforcement of said judgment is contrary to good conscience and equity because the said supersedeas bond on which said judgment is based was executed solely in consideration of that certain appeal taken by said Singer Sewing Machine Company from the judgment herein entered on or about May 31, 1928, and for the purpose of staying execution on said judgment against said Singer Sewing Machine Company and the appeal of said Singer Sewing Machine Company was sustained and pursuant to the remittitur from the Supreme Court of Idaho, judgment was entered herein on or about May 24, 1930, to the effect that plaintiffs take nothing in said action against said Singer Sewing Machine Company, and that the case be dismissed as to said company, and that Singer Sewing Machine Company have judgment against plaintiffs herein for the sum of Five Hundred Twenty-two and 85-100 Dollars ($522.85), and it is, therefore, contrary to good conscience and equity to enter judgment against the said American Surety Company of New York, as surety, when no recovery can be had against its sole principal on said supersedeas bond.

70 *Motion.*

IV.

That said judgment was entered without notice to the said American Surety Company of New York or the said Singer Sewing Machine Company.

And said American Surety Company of New York further moves this Court to stay all proceedings under execution upon said judgment pending the determination of this motion.

Said motion is based on the records and files in
71 this action, including a copy of the said supersedeas bond hereto attached and made a part hereof, and the affidavit of McKeen F. Morrow hereto attached and made a part hereof.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York.
Residence: Boise, Idaho.

(Endorsed: Filed June 26, 1930.)

72

73

Exhibit "A".

IN THE

DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO,

IN AND FOR THE COUNTY OF ADA.

VIVIAN F. BALDWIN, and E. R. BALDWIN,
Plaintiffs,

74

vs.

SINGER SEWING MACHINE COMPANY, a corporation, and ED. ANDERSON,
Defendants.

Undertaking on Appeal.

No. 11860

75

Filed A. M.....P. M....., August 29, 1928.

STEPHEN UTTER,
Clerk,

By B. CLYDE EAGLESON,
Deputy.

Whereas the defendant, Singer Sewing Machine Company, a corporation, in the above en-

76 *Exhibit A.*

titled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70-100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, and from the whole of said judgment;

77

AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

NOW, THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-
78 five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which

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the appeal is taken, judgment may be entered on motion of respondents in their favor and against the undersigned surety for the sum of Nineteen Thousand Five Hundred Seventy-three and 70-100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

IN WITNESS WHEREOF, the said American Surety Company, has caused its name and seal to be attached hereto by its proper officers and agents at Boise, Idaho, this 28th day of August, 1928.

80

AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD E. STEIN,
Attorney-in-Fact.
Countersigned:
HOWARD E. STEIN,
Agent at Boise, Idaho.

(SEAL)

Countersigned:
RICHARD & HAGA,
O. O. HAGA.

81

It is hereby agreed that the within bond is hereby accepted insofar as the amount is concerned without regard to it being double the amount of the judgment.

Dated at Boise, Idaho, this 29th day of August, 1928.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.
Residence: Boise, Idaho.

82

Affidavit.

[TITLE OF COURT AND CAUSE.]

STATE OF IDAHO, }
COUNTY OF ADA, } ss.:

McKEEN F. MORROW, being first duly sworn, upon his oath, deposes and says: That he is a member of the firm of Richards & Haga, attorneys for American Surety Company of New York, and makes this affidavit on behalf of said American
83 Surety Company of New York for the reason that all of its officers reside outside the State of Idaho, where attorneys for said party reside, and that he has personal knowledge of the facts herein set forth; that the judgment entered herein in favor of plaintiffs and against American Surety Company of New York, a corporation, surety, was made and entered without notice to said American Surety Company of New York or any of its officers or agents; that after the entry of said judgment and on or about the 24th day of June, 1930, the said plaintiffs, through their attorneys, caused
84 execution to issue from the above entitled Court upon said judgment and thereupon delivered said execution to the Sheriff of Ada County, together with a written demand addressed to the Treasurer of the State of Idaho for delivery of certain United States Liberty Bonds held by said State Treasurer pursuant to Section 5104, Compiled Statutes of Idaho, sufficient to satisfy said judgment. That thereupon the said Sheriff of Ada County served said writ of execution upon Byron Defenbach, Treasurer of the State of Idaho, on

said 24th day of June, 1930, and presented a written demand for delivery of bonds deposited with said State Treasurer by the said American Surety Company of New York sufficient in amount to satisfy said judgment, and thereupon the said Byron Defenbach, Treasurer of the State of Idaho, delivered to the said Sheriff of Ada County certain registered United States Liberty Bonds payable to the Treasurer of the State of Idaho, bearing four and one-quarter per cent interest, maturing 1933-1938, numbered as follows: Bonds 46289 and 46290, $10,000 each; bonds 559144, 559145 and 559146, $1,000 each, together with the unmatured coupons attached thereto. That the said Sheriff of Ada County, Idaho, at the request of attorneys for plaintiffs thereupon issued and posted a certain notice of sale to the effect that said bonds would be sold at public auction to the highest bidder for cash on Monday, June 30, 1930, at 10:00 o'clock A. M. That the levy of said execution and the taking of possession of said bonds and the advertising of said bonds for sale as aforesaid is in violation of the provisions of Section 5104, Idaho Compiled Statutes, 1919.

McKeen F. Morrow.
(Duly verified)

88

Stipulation.

[Title of Court and Cause.]

It is hereby stipulated and agreed, by and between the plaintiffs and the defendants, Singer Sewing Machine Company, a corporation, Ed. Anderson, and American Surety Company of New York, that the sale of certain securities belonging to the American Surety Company of New York, heretofore noticed by the Sheriff of Ada County, Idaho, for August 11th, 1930, may be postponed
89 until the 21st day of August, 1930.

This stipulation is made by reason of the fact that the above entitled court now has under advisement the motion of the defendant, American Surety Company of New York, to vacate and set aside the judgment for $22,357.21, together with interest, entered against said defendant American Surety Company of New York on June 23, 1930.

This stipulation is expressly made without any of the defendants concurring in or recognizing in any manner or to any extent the validity of the said judgment or the execution issued pursuant
90 thereto or any other steps or proceedings taken by plaintiffs pursuant to said judgment or execution, and is made without waiver by any of the said defendants of any objections or exceptions to the validity of the said judgment and the said execution issued pursuant thereto, and any steps or proceedings taken pursuant either to said judgment or to said execution.

Stipulation. 91

This stipulation is made by all parties without waiver of any rights on behalf of any of them except as to the continuance of said sale.

Dated this 8th day of August, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

MARTIN & MARTIN,
Attorneys for Defendant Singer Sewing Machine Company, a Corporation. 92

H. B. WALKER,
Attorney for Ed. Anderson.

RICHARDS & HAGA,
Attorneys for Defendant American Surety Company of New York.

Order. 93

Pursuant to the foregoing stipulation, it is hereby ordered that the Sheriff's sale of certain securities of the American Surety Company of New York, heretofore noticed by the Sheriff of Ada County, Idaho, for August 11th, 1930, be and the same hereby is postponed and continued to the 21st day of August, 1930, at 10:00 o'clock, A. M.

CHARLES F. KOELSCH,
District Judge.

94 **Minutes of the Proceedings of the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, on August 12, 1930. Journal Y, Page 155.**

VIVIAN F. BALDWIN, Plaintiff, *vs.* SINGER SEWING MACHINE COMPANY *et al.*, Defendants.	No. 11,860

95 In this cause the motion to declare the judgment void and to set the same aside having been heretofore taken under advisement, the court at this time rendered its decision and granted said motion and ordered counsel for the Surety Company to prepare the proper order to this effect to which ruling the plaintiffs duly excepted, which exception was allowed by the court.

96 CHARLES F. KOELSCH,
District Judge.

Order Vacating Judgment.

97

[TITLE OF COURT AND CAUSE.]

The motion of American Surety Company of New York, a corporation, to vacate and set aside that certain judgment entered against said American Surety Company of New York, a corporation, for the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, made and entered in the above entitled cause on the 23rd day of June, 1930, having come on duly for hearing before the 98
Court on June 30, 1930, Messrs. Richards & Haga and Messrs. Martin & Martin appearing for said American Surety Company of New York, a corporation, and James F. Ailshie, Jr., and J. R. Smead, appearing for the plaintiffs, Vivian F. Baldwin and E. R. Baldwin, and the matter having been argued to the Court, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED and DECREED, That that certain judgment made and entered in the above entitled cause on June 23, 1930, against the American Surety Company 99
of New York, a corporation, in the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, be, and the same hereby is, vacated, annulled and set aside, and the same is hereby declared to be null and void, and the execution issued pursuant thereto be, and the same hereby is quashed and recalled.

Dated this 12th day of August, 1930.

CHARLES F. KOELSCH,
District Judge.

(Endorsed: Filed August 12, 1930.)

100

Certificate of Papers Used.

[Title of Court and Cause.]

The court having heretofore, on the 12th day of August, 1930, entered an order vacating and setting aside that certain judgment made and entered in the above entitled cause on June 23rd, 1930, in favor of the plaintiffs and against the American Surety Company of New York, a corporation, now certifies that in passing upon defendant American Surety Company's motion to vacate
101 and set aside the said judgment, the following papers, records and files were considered and none other.

Judgment in favor of the said plaintiffs and against the defendants Ed. Anderson and Singer Sewing Machine Company, entered May 31, 1928.

Notice of appeal of defendants Anderson and Singer Sewing Machine Company, dated August 27, 1928.

Undertaking on appeal, filed August 29, 1928.

Stay or supersedeas bond, filed August 29, 1928.

Order directing the reporter to prepare a tran-
102 script of the evidence upon the trial, dated August 29, 1928.

Praecipe to clerk of defendants Anderson and Singer Sewing Machine Company.

Remittitur of the Supreme Court of Idaho.

Judgment of May 24, 1930, based upon remittitur of the Supreme Court of Idaho.

Judgment against the American Surety Company, dated June 23, 1930.

Motion, dated June 26, 1930, to vacate and set aside as null and void the said judgment against

said American Surety Company, together with supporting affidavit.

Stipulation and order approving the same, filed August 9, 1930.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial. Dated this 18th day of August, 1930.

CHAS. F. KOELSCH,
District Judge. 104

(Endorsed: Filed August 18, 1930.)

Notice of Appeal.

[TITLE OF COURT AND CAUSE.]

To Singer Sewing Machine Company, a corporation, and Messrs. Martin & Martin and H. B. Walker, its attorneys, Ed. Anderson and Messrs. Martin & Martin and H. B. Walker, his Attorneys, American Surety Company of New York and Messrs. Richards & Haga and Martin & Martin, its attorneys, and to Stephen Utter, clerk of the above entitled District Court: 105

YOU AND EACH OF YOU will please take notice that the plaintiffs hereby appeal to the Supreme Court of the State of Idaho from that certain order, made and entered in the above entitled action on

the 12th day of August, 1930, which said order vacates and holds as void that certain judgment entered in favor of plaintiffs and against the American Surety Company of New York on the 23rd day of June, 1930, for the sum of $22,357.21, together with interest.

Dated this 19th day of August, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

Service admitted this 19th day of August, 1930.

MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company.

RICHARDS & HAGA,
Attorneys for American Surety Company of New York.

H. B. WALKER,
Attorney for Ed. Anderson.

(Endorsed: Filed August 19, 1930.)

Undertaking on Appeal.

[TITLE OF COURT AND CAUSE.]

WHEREAS, the plaintiffs, Vivian F. Baldwin and E. R. Baldwin, in the above entitled action have appealed to the Supreme Court of the State of Idaho from that certain order made and entered on the 12th day of August, 1930, which said order vacates and holds as null and void that certain judgment in favor of plaintiffs and against the American Surety Company of New York, for the sum of $22,357.21, together with interest;

Now, THEREFORE, The Maryland Casualty Company of Baltimore, Maryland, a foreign corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal, does hereby undertake and promise, on the part of said appellants Vivian F. Baldwin and E. R. Baldwin, that the said appellants will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, not exceeding $300.00, to which amount the said Maryland Casualty Company of Baltimore, Maryland, acknowledges itself duly bound.

IN WITNESS WHEREOF, the said Maryland Casualty Company of Baltimore, Maryland, has caused its name and seal to be attached hereto by its proper officer and agent at Boise, Idaho, this 19 day of August, 1930.

MARYLAND CASUALTY COMPANY OF
BALTIMORE, MARYLAND,
(SEAL) By BRADLEY SHEPPARD,
Attorney-in-Fact.

(Endorsed: Filed August 19, 1930.)

112

Praecipe.

[TITLE OF COURT AND CAUSE.]

To Stephen Utter, Clerk of the above entitled District Court:

You will please take notice that you are hereby requested and required to prepare a transcript in the above entitled cause for use on appeal to the Supreme Court of the State of Idaho, which transcript shall consist of and embrace the following
113 papers and matters, to-wit:

1. The following from the records and files of Baldwin, *et al., v.* Singer Sewing Machine Company and Ed. Anderson:

Judgment in favor of plaintiffs entered May 31, 1928.

Notice of Appeal of the defendants, dated August 27, 1928.

Undertaking on said appeal, filed August 29, 1928.

114 Supersedeas bond on said appeal, filed August 29, 1928.

Order directing reporter to prepare a transcript of the evidence upon the trial of said case, dated August 29, 1928.

Praecipe to Clerk to the defendants in said case.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial.

Remittitur of the Supreme Court of Idaho.
Judgment entered May 24, 1930, pursuant to said remittitur. 115

2. And the following from the records and files herein:

Judgment against the American Surety Company, dated June 23, 1930.
Motion, dated June 26, 1930, to vacate and set aside as void said judgment against the American Surety Company, together with supporting affidavit. 116
Stipulation and order approving the same, filed August 9, 1930.
Order of District Court granting said motion to vacate judgment against the American Surety Company.
Notice of appeal of Vivian F. Baldwin and E. R. Baldwin from said order.
Undertaking on said appeal.
Minutes of the court of August 12, 1930.
Certificate of trial judge of papers and files used upon the hearing and decision of said motion. 117
This praecipe.

And you are further requested to attach your certificate to said transcript, as provided by law.

Dated this 20th day of August, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs and Appellants.

(Endorsed: Filed August 20, 1930.)

118

Transcript of Record.

[Title of Court and Cause.]

We, the undersigned, James F. Ailshie, Jr., and J. R. Smead, attorneys for Vivian F. Baldwin and E. R. Baldwin; Martin & Martin, attorneys for Singer Sewing Machine Company, a corporation; H. B. Walker, attorney for Ed. Anderson; and Richards & Haga and Martin & Martin, attorneys for American Surety Company of New York, a
119 corporation, do hereby certify the foregoing transcript of pages numbered from 5 to 38, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same constitute the transcript of the record herein upon appeal to the Supreme Court of the State of Idaho, and that we have compared the foregoing transcript with the original papers in the above entitled action of Vivion F. Baldwin and E. R. Baldwin, plaintiffs, *vs.* Ed. Anderson, defendant, and American Surety Company of New York, a corporation, surety, in the district
120 court of the third judicial district of the State of Idaho, in and for the County of Ada, and on file of record in the office of the clerk of said district court, and certify that the foregoing transcript contains true and correct copies of the following papers and matters, to-wit:

1. The following from the records and files of Baldwin *et al., vs.* Singer Sewing Machine Company and Ed. Anderson:

Judgment in favor of plaintiffs entered May 31, 1928.

Notice of appeal of the defendants, dated August 27, 1928.

Undertaking on said appeal, filed August 29, 1928.

Supersedeas bond on said appeal, filed August 29, 1928.

Order directing reporter to prepare a transcript of the evidence upon the trial of said case, dated August 29, 1928.

Praecipe to Clerk of the defendants in said case.

Notice of appeal by defendant Anderson from order denying new trial.

Notice of appeal by defendant Singer Sewing Machine Company from order denying new trial.

Remittitur of the Supreme Court of Idaho.

Judgment entered May 24, 1930, pursuant to said remittitur.

2. And the following from the records and files herein:

Judgment against the American Surety Company, dated June 23, 1930.

Motion, dated June 26, 1930, to vacate and set aside as void said judgment against the American Surety Company, together with supporting affidavit.

Stipulation and order approving the same, filed August 9, 1930.

124 *Transcript of Record.*

Order of District Court granting said motion to vacate judgment against the American Surety Company.

Notice of appeal of Vivian F. Baldwin and E. R. Baldwin from said order.

Undertaking on said appeal.

Minutes of the court of August 12, 1930.

Certificate of trial judge of papers and files used upon the hearing and decision of said motion.

125 The praecipe.

We further certify that an undertaking on appeal in due form was filed in said action on the 19th day of August, 1930.

FURTHER, it is stipulated that the foregoing transcript shall be used in lieu of and with the same force and effect as a clerk's transcript of the foregoing papers and matters, and that this certificate shall in all respects have the same force and effect of a certificate of the clerk of the district court of the third judicial district of the State

126

of Idaho, in and for the county of Ada, duly executed.

Dated this 5th day of September, 1930.

JAMES F. AILSHIE, JR.,
J. R. SMEAD,
Attorneys for Plaintiffs.

H. B. WALKER,
Attorney for Defendant Ed. Anderson.

128

MARTIN & MARTIN,
Attorneys for Singer Sewing Machine Company, a corporation.

RICHARDS & HAGA,
MARTIN & MARTIN,
Attorneys for American Surety Company of New York, a corporation.

Service of the foregoing transcript is hereby admitted this 11th day of September, 1930.

129

H. B. WALKER
Attorney for Ed. Anderson.

MARTIN & MARTIN
Attorneys for Singer Sewing Machine Company.

RICHARDS & HAGA
MARTIN & MARTIN
Attorneys for American Surety Company of New York.

Supreme Court of Idaho
Filed
Sep 11 1930
CLAY KOELSCH,
Clerk

130

Order.

BOISE, IDAHO, March 9, 1931.

Court met pursuant to adjournment.

Present: Chief Justice LEE and Associate Justices BUDGE, GIVENS, VARIAN and MCNAUGHTON.

The following proceedings (among others) were had:

131

VIVIAN F. BALDWIN, *et al.*,
Appellants,

v.

ED. ANDERSON, *et al.*,
Respondents.

No. 5653

This cause having been heretofore set for hearing on the merits on this day the same was called, James F. Ailshie and J. R. Smead appeared as
132 counsel for appellants, Frank Martin, Sr., and McKeen Morrow appeared for respondents. Upon argument this cause was ordered taken under advisement.

133

Order.

BOISE, IDAHO, May 2, 1931.

Court met pursuant to adjournment.

Present: Associate Justices BUDGE, GIVENS, VARIAN and MCNAUGHTON.

The following proceedings (among others) were had:

134

VIVIAN F. BALDWIN and E. R. BALDWIN, Appellants, v. ED. ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a corporation, Respondents.	No. 5653

135

This cause having been heretofore heard and taken under advisement by the Court, and the Court having fully considered the same, on this day the decision of the Court is delivered by Justice McNaughton, to the effect that the order of the District Court of the Third Judicial District for Ada County vacating the judgment be and the same is hereby reversed, with costs to appellants in the sum of $96.

136 **Opinion by McNaughton, J.**

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

No. 5653.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Appellants,

137 *vs.*

ED. ANDERSON and AMERICAN SURETY COMPANY OF NEW YORK, a corporation,
Respondents.

Boise, Jan. Term, 1931.
Filed May 2, 1931.
Clay Koelsch, Clerk.

Appeal from the District Court of the Third Judicial District, for Ada County. Hon. Charles F. Koelsch, Judge.

138 Appeal from an order setting aside judgment on supersedeas undertaking. *Reversed.*

JAMES F. AILSHIE, JR., and J. R. SMEAD, for Appellants.

MARTIN & MARTIN, H. B. WALKER, and RICHARDS & HAGA, for Respondents.

MCNAUGHTON, J.

This is an appeal from an order setting aside as void a judgment against a bondsman. The

judgment against the respondent company was entered pursuant to C. S., sec. 7155, on an undertaking on appeal.

Appellants Baldwin, as plaintiffs, had procured a judgment against Ed. Anderson and the Singer Sewing Machine Company as defendants in the district court. The defendants jointly gave notice of appeal and appealed the case to the supreme court. On appeal the following undertaking was executed and filed:

"Whereas the defendant, Singer Sewing 140
Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the judgment made and entered against it in the above entitled action and in the above entitled court in favor of the plaintiffs in said action on the 31st day of May, 1928, for the sum of Nineteen Thousand Five Hundred ($19,500.00) Dollars and for Seventy-three and 70/100 ($73.70) Dollars costs in said suit, making a total of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, and from the whole of said judgment; 141

"AND WHEREAS, the said appellant, Singer Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from;

"NOW THEREFORE, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of twenty-five thousand

($25,000) Dollars, gold coin of the United States, that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the
143 Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor and against the undersigned surety for the said sum of Nineteen Thousand Five Hundred Seventy-three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal.

"In Witness Whereof, the said American Surety Company, has caused its name and seal to be attached hereto by its proper offi-
144 cers and agents at Boise, Idaho, this 28th day of August, 1928.

American Surety Company of New York

by Howard E. Stein,
Attorney-in-Fact."

In the supreme court the judgment was affirmed as to Anderson but reversed as to Singer Sewing Machine Company. The remittitur was filed in the district court on May 22, 1930. Pursuant to the remittitur, on May 24th the district court en-

tered judgment dismissing the case as to Singer Sewing Machine Company. On June 23d the appellants Baldwin moved for judgment against the American Surety Company on the undertaking, which they claimed stayed execution on the whole judgment. This motion was granted and judgment accordingly was entered. Thereafter the American Surety Company moved to vacate and set aside said judgment on the grounds that it was, (1) void; (2) contrary to good conscience, and (3) was entered without notice to the American Surety Company. The motion was granted 146 and an order entered whereby said judgment was declared null and void, and was annulled, vacated and set aside. From this order the present appeal was taken.

Many assignments of error are made, but so far as this appeal is concerned we deem it necessary to consider only those which challenge the ruling of the lower court to the effect that the judgment against the Surety Company on the undertaking was void.

The briefs on both sides very ably and in great detail discuss the legal effect of the different pro- 147 visions of the bond in light of the nature of the appeal. The appellants claim that the undertaking by its terms superseded and stayed execution upon the whole judgment and is conditioned to pay any part thereof affirmed by the supreme court, and that such being the conditions of the bond its recital of introductory facts is misleading and not controlling. On the other hand the respondents devote the major portion of their brief to the contention that the recital of facts in the introductory part of the undertaking gov-

erns the condition and obligation of the undertaking; that such recitals limit the stay of execution to the Singer Sewing Machine Company only, and the obligation is to pay only such judgment in whole or in part as might be affirmed against the Singer Sewing Machine Company.

We disclaim any intention or right to construe the legal effect of the undertaking in question further than to examine it in aid of determining the sole question of the court's jurisdiction to hear and determine the motion for judgment
149 thereon.

The surety company did not claim error, and appeal. It did not claim inadvertence or mistake. It challenged the court's jurisdiction and moved to set aside the judgment as void. The whole question here is a question of jurisdiction. Nothing further. Nothing else.

If a court has jurisdiction of the parties, jurisdiction of the subject matter and jurisdiction of an issue of law or fact presented, then its judgment upon that issue is not void whether erroneous or not. Such judgments in the absence of mis-
150 take or, in a proper case, motion for new trial, may be corrected only by appeal. Bunnell and Eno, etc., Co. *v.* Curtis, 5 Ida. 652, 51 Pac. 767; Taylor *v.* Hulett, 15 Ida. 265, 97 Pac. 37; Wyllie *v.* Kent, 28 Ida. 16, 152 Pac. 194; United States Nat. Bank *v.* Eldredge, 49 Ida. 363, 288 Pac. 416.

Regarding notice: Where a supersedeas undertaking for stay of execution is filed pursuant to C. S. sec. 7155, it is held the surety becomes a party to the action and if the judgment stayed by the undertaking is affirmed in whole or in part

and remains unsatisfied for thirty days the judgment creditor may move in the action for judgment on the undertaking against the surety, and it is unnecessary to give the Surety company notice of such motion. Empire State-Idaho Min. & Developing Co. *v.* Hanley, 136 Fed. 99; U. S. Fidelity & G. Co. *v.* Ft. Misery Highway Dist., 22 Fed. (2d) 369; Gray *v.* Cotton (Cal.), 162 Pac. 1019; Portland Trust Co. *v.* Havely (Ore.), 61 Pac. 346.

It is claimed by respondent that these authorities are not in point because the legal effect of an 152
undertaking is the same as that of a bond in that the party executing the undertaking is simply surety for a principal; that in this case the introductory recitals of the undertaking disclose that the principal is the Singer Sewing Machine Company, and that upon the action being dismissed as to it such dismissal was also a dismissal as to the Surety company. We cannot accept this view. The undertaking is a complete independent contract. The obligation of its maker is not collateral or secondary. Moffat *v.* Greenawalt (Cal.), 153
27 Pac. 296. Its obligations are to be determined from the instrument itself. If the contract stayed the whole judgment and promised in consideration thereof to pay any part thereof affirmed in the supreme court which remained unpaid thirty days after the remittitur was filed, it remains a party to the action and liable until that obligation is satisfied.

As to jurisdiction of the subject matter of the motion: It is urgently claimed by the respondent that the district court was without jurisdiction to

render the judgment on the undertaking which was entered. As we understand respondent's argument on this phase it is to the effect that it becomes necessary for this court to construe the bond to determine whether the district court had jurisdiction to enter the judgment. Quoting from Freeman on Judgments, 5th Ed., Vol. 1, pp. 444-445, respondents' argument proceeds:

> "'Aside from these cases in which the purported judgment is in reality no judgment, and considering those cases in which there has
155 been an attempt at judicial action by a competent court, a judgment is not regarded as void unless there was a total lack of jurisdiction to render it. There are in general three jurisdictional elements in every valid judgment namely, jurisdiction of the subject matter, jurisdiction of the person, *and the power or authority to render the particular judgment.* For the absence of any one of these elements, when properly apparent, the judgment may be vacated at any time, whether before or after the term or the time limited by statute for motions on statutory grounds, either on motion or of its own volition without sugges-
156 tion.'"

The phrase in italics may be misleading. This matter is somewhat clarified by the quotation from Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36, as follows:

> "In addition to the jurisdiction of the parties and the subject matter, it is necessary to the validity of a judgment that the Court should have jurisdiction of the question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant."

In the Gile case an action was brought for the foreclosure of a mortgage. No allegation of indebtedness of defendant to plaintiff was contained in the complaint or claim made for a deficiency judgment. Nevertheless in the decree deficiency judgment was given. On motion, this provision of the decree was stricken as void for want of jurisdiction to award deficiency judgment. Had a question of right to deficiency judgment been presented to the court, and had the right to such relief been dependent upon a judicial construction, 158
a very different question would have arisen on the motion to declare void. In such case clearly there might have been error but the judgment would not have been void. The vice in Gile *v.* Wood which rendered part of the judgment void was that the court adjudged there was a right to deficiency judgment though no such question was submitted to the court. The court's jurisdiction was not dependent upon a proper construction of any document. It was dependent upon the question of whether right to deficiency judgment was submitted to the court. That issue not being presented the judgment upon it was held to be void 159
for want of jurisdiction to adjudge it, and it was set aside on motion. See also Maloney *v.* Zipf, 41 Ida. 32, 237 Pac. 632.

In the case at bar the only question presented to the court was as to right to judgment on the bond which was presented to the court by appellants in the manner provided by statute for the submission of that issue. This challenged judicable inquiry.

160 *Opinion by McNaughton, J.*

The question or issue presented was, did the Surety company, in its undertaking, become a party liable for every part of the judgment appealed from which might be affirmed by the supreme court, or did it stipulate only as to such judgment or part thereof as might be affirmed against the Singer Sewing Machine Company? To answer this question the court must look to the bond. The issue required a construction of the bond as a whole. The trial court had juris-
161 diction of this question. It construed the bond in favor of appellants and against the Surety company. It was not only in that court's power, but it was its duty, to decide the question submitted. *In re* Clerf (Wn.), 104 Pac. 622; Windfrey *v.* Benton (Okla.), 106 Pac. 853. Whether it decided right or wrong its decision was a judgment which could be reviewed for error, if there was error, only by this court on appeal. Bunnell and Eno, etc., Co. *v.* Curtis, *supra;* Taylor *v.* Hulett, *supra;* Wyllie *v.* Kent, *supra;* United States Nat. Bank *v.* Eldredge, *supra.* On appeal the question could
162 be re-examined. The undertaking cannot be examined and its legal effect as to this issue be determined by us on this appeal. We may consider it only insofar as to determine whether its wording is such that it afforded color of legal right in appellants to judgment. That is to say, whether appellants' motion presented a legitimate question and was not an imposition or fraud upon the court. We think, regardless of what our construction of the bond might be, it cannot be said appellants held no right to submit the question. Nor can it be said that such submission was a

fraud upon the court and on that ground its judgment was void.

We find the trial court, upon the motion for judgment on the bond, had jurisdiction of the parties and jurisdiction of the subject matter; that an issue was presented and it had jurisdiction to construe the undertaking and decide the issue which its judgment assumes to decide. It follows the judgment was not void, even if erroneous in the construction, and that the trial court committed error in annulling and vacating it as void. 164

The order vacating the judgment is reversed, with costs to appellants.

Lee, C.J., Givens and Varian, JJ., concur.

Dissenting Opinion by Budge, J.

May 2, 1931.

BUDGE, J., dissenting.

In extension of the facts stated in the majority opinion, it appears that Vivian F. Baldwin and her husband instituted an action in the district court against the Singer Sewing Machine Company, a corporation, and one Anderson, to recover damages for personal injuries alleged to have been sustained by Vivian F. Baldwin as a result of being struck by an automobile driven by Anderson. The complaint alleged that at the time of the accident Anderson was an agent of the sewing machine company acting within the scope of his employment. From a judgment against the 165

166 *Dissenting Opinion by Budge, J.*

sewing machine company and Anderson an appeal was taken to this court, resulting in a reversal of the judgment against the sewing machine company and affirmance of the judgment against Anderson.

To stay execution of the judgment of the trial court against the sewing machine company pending appeal, the American Surety Company executed a supersedeas bond, in terms as set out in the majority opinion. Upon the going down of the remittitur of this court, filed in the office of
167 the clerk of the district court May 22, 1930, and in compliance therewith, the trial court "ordered, adjudged and decreed . . . that the plaintiffs Vivian F. Baldwin and E. R. Baldwin take nothing from defendant Singer Sewing Machine Company, and that the said cause of action be, and the same is hereby dismissed as to the defendant Singer Sewing Machine Company, a corporation."

On June 23, 1930, upon *ex parte* motion, appellants here, before a judge other than the other who tried the original action, procured a judgment to be entered against the American Surety
168 Company on the supersedeas bond. On June 26, 1930, upon notice and motion, respondents moved the court to set aside and vacate the judgment theretofore entered against the American Surety Company, upon three grounds, (1) that the judgment was void; (2) that it was contrary to good conscience; and (3) that it was entered without notice to the American Surety Company. After a hearing and due consideration of the motion, and affidavit filed therewith, the court made the following order:

"Now, therefore, it is hereby ordered, adjudged and decreed, that that certain judgment made and entered in the above entitled cause on June 23, 1930, against the American Surety Company of New York, a corporation, in the sum of $22,357.21, together with interest thereon at the rate of seven per cent per annum from date until paid, be, and the same hereby is, vacated, annulled and set aside, and the same is hereby declared to be null and void, and the execution issued pursuant thereto be, and the same hereby is quashed and recalled." 170

This appeal is taken from the above order.

In the majority opinion it is held that the lower court had jurisdiction to enter the judgment upon the supersedeas bond and that its action in this regard is not subject to be reviewed by notice and motion, but on appeal. This position to my mind is not tenable. This court has now before it the identical record it would have, had an appeal been taken. If the judgment entered upon the supersedeas bond is void upon its face and it so appears from the record, it was subject to attack upon notice and motion, or it was within the 171 power of the trial court, upon its own motion, independent of any statute, to vacate the judgment. Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36; Nixon *v.* Tongren, 33 Ida. 287, 193 Pac. 731; Miller *v.* Prout, 33 Ida. 709, 197 Pac. 1023; 15 Cal. Jur., pp. 52-53, Sec. 141; Dubois *v.* Clark (Colo.), 55 Pac. 750. Even though the judgment was not void upon the face of the record, it was nevertheless subject to be vacated upon motion made within a reasonable time by a showing of lack of

jurisdiction of the court to enter it. Armitage *v.* Horshoe Bend Co., 34 Ida. 179, 204 Pac. 1073; Nixon *v.* Tongren, *supra;* Norton *v.* Atchison, T. & S. F. R. Co. (Cal.), 30 Pac. 585, 32 Pac. 452, 33 A. S. R. 198; 14 Cal. Jur., pp. 1024, *et seq.*

The supersedeas bond upon its face and throughout its contents shows clearly that it was given to stay execution upon the judgment and the whole thereof entered against the sewing machine company. Anderson's name nowhere appears in the bond, and in order to uphold the
173 judgment entered upon the supersedeas bond it becomes necessary for the court to read into the bond that it was given to stay execution of the judgment against Anderson as well as against the sewing machine company. This the court has no authority to do.

It is fallacious to contend that under a judgment joint in form but in fact and in law joint and several against two or more defendants, a stay of execution on such judgment in favor of one of the defendants pending an appeal is a stay of execution as against all of the defendants. It is like-
174 wise illogical to contend that a supersedeas bond stays proceedings in favor of a person not named in the bond. Appellants were in a position at any time from the entry of the original judgment against the sewing machine company and Anderson to execute upon the judgment against Anderson, the latter having furnished no supersedeas bond. C. S. secs. 7155, 6902 (amended, Sess. Laws 1929, p. 70); 23 C. J., p. 533; 3 C. J., p. 1324, Sec. 1451; 2 Cal. Jur., p. 472, Sec. 222; Drabant *v.* Cure (Pa.), 124 Atl. 340; State *v.* Beveridge

(Or.), 218 Pac. 1112; Bergevin *v.* Wood (Cal.), 105 Pac. 935; *Ex parte* French, 100 U. S. 1, 25 L. Ed. 529.

The supersedeas bond is the foundation of the judgment obtained thereon and must be interpreted from its four corners. The surety is entitled to have his bond strictly construed. His liability cannot be extended by implication. He has a right to stand upon the exact words of his contract, and his liability is limited to the language of his bond. City of Pocatello *v.* Fargo, 176
41 Ida. 432, 242 Pac. 297; Jackson *v.* Barrett, 12 Ida. 465, 86 Pac. 270. With this principle in mind the bond should be examined for the purpose of determining whether the court had jurisdiction to enter the particular judgment. The court must not only have jurisdiction of the person and the subject matter but power and authority to render the particular judgment. In the opening of the bond we find this language:

> "Whereas, the defendant Singer Sewing Machine Company, a corporation, in the above entitled action has appealed to the Supreme Court of the State of Idaho from the 177
> judgment made and entered against it in the above entitled action in the above entitled court in favor of the plaintiffs in said action
>
> . . . and from the whole of said judgment."

The whole of said judgment against the Singer Sewing Machine Company, not the whole of the judgment against Anderson. Anderson is an entire stranger to the American Surety Company. That he was never thought of when the supersedeas bond was given is a fact apparent from the

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entire record. To read his name into the bond or to create a liability against the American Surety Company by reason of the fact that the judgment was rendered against Anderson and the Singer Sewing Machine Company is to do violence to the language of the bond. No language could be plainer to my mind, from a reading of the bond, than that it was the intention of the American Surety Company to furnish a supersedeas bond for the Singer Sewing Machine Company alone. Had it intended to furnish a bond
179 for both the sewing machine company and Anderson, language would have been used to that effect. It names the Singer Sewing Machine Company in its bond, it refers to the judgment entered against the sewing machine company in its bond, and the bond is given to stay execution against the whole of the judgment entered against the sewing machine company. This is further emphasized by the next paragraph of the bond, which is as follows:

> "And whereas, the said appellant, Singer
> 180 Sewing Machine Company, a corporation, is desirous of staying the execution of said judgment so appealed from."

What judgment? The judgment appealed from by the Singer Sewing Machine Company. We must look to the whole instrument to gather the intention of the parties, the preamble as well as the condition of the bond, and particularly is this true where there is doubt. The condition of the bond is even more explicit than the preamble in limiting liability on the bond to a stay of execu-

tion against the Singer Sewing Machine Company. It is as follows:

> "Now, therefore, the undersigned American Surety Company, a corporation authorized to, and doing business in the State of Idaho, in consideration of the premises and of such appeal on the part of said appellant, Singer Sewing Machine Company, a corporation, does hereby acknowledge itself firmly bound in the sum of Twenty-five Thousand ($25,000.00) Dollars, gold coin of the United States, that if the said judgment appealed
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> from, or any part thereof, be affirmed, or the appeal dismissed, the appellant will pay in gold coin of the United States of America, the amount directed to be paid as to which said judgment shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of respondents in their favor and against the undersigned surety for the sum of Nineteen Thousand Five Hundred Seventy-
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> three and 70/100 ($19,573.70) Dollars, together with the interest that may be due thereon and the damages and costs which may be awarded against the said appellant, Singer Sewing Machine Company, upon the appeal."

It affirmatively appears from the condition of the bond as above set out that the bond was given solely for the purpose of staying execution against the Singer Sewing Machine Company, with the amount of the judgment payable only in the event

184 *Dissenting Opinion by Budge, J.*

the judgment against the Singer Sewing Machine Company or any part thereof be affirmed. If the judgment against the sewing machine company had been affirmed in part the bond would be answerable to the extent of the affirmance.

The bond is unambiguous and clearly determines the liability of the surety. There is no room for construction and no justification for holding that the bond will be considered no further than to examine it in aid of determining the sole question of the trial court's jurisdiction to
185 enter judgment on the bond. Even under such a technical view there is ample justification for holding that the judgment entered on the supersedeas bond was void. But the majority opinion actually construes the bond and its legal effect and holds that because the judgment was affirmed as to Anderson, it was affirmed in part and the surety is liable.

To recapitulate, we have this situation: The district court had no jurisdiction over the Singer Sewing Machine Company after the judgment against it had been set aside in this court. The
186 rule is that when an order is entered in an appellate court reversing a judgment it is forthwith vacated and no longer remains in existence. 2 R. C. L., p. 270, Sec. 222. When the judgment was set aside as to the sewing machine company, the American Surety Company could not be liable because its principal had been dismissed. 1 Freeman on Judgments (5th Ed.), p. 1026; Sec. 466; Howell *v.* Alma Milling Co., 36 Nebr. 80, 38 A. S. R. 694, notes, pp. 702-712; First Nat. Bank *v.* Rogers, 13 Minn. 407, 97 Am. Dec. 239; Burnham

v. Edwards (Okl.), 257 Pac. 788. The bond upon its face, in unmistakable language, shows that it was given to stay execution against the Singer Sewing Machine Company and for no one else, and the court therefore had no authority to construe the bond to include the judgment against Anderson. The judgment against the surety company on the supersedeas bond was therefore void when entered, and was subject to attack by motion to, and was properly set aside.

No other result can follow from the holding of the majority than a miscarriage of justice, and it is repugnant to both the state and federal constitutions in that the surety company is deprived of its property without due process of law. 188

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190 No. 5653

IN THE

SUPREME COURT OF THE STATE OF IDAHO.

VIVIAN F. BALDWIN and E. R. BALDWIN,
Appellants,

vs.

ED. ANDERSON and THE AMERICAN SURETY COMPANY OF NEW YORK, a corporation,

191 *Respondents.*

PETITION FOR REHEARING OF RESPONDENT AMERICAN SURETY COMPANY OF NEW YORK.

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

HON. CHARLES F. KOELSCH, *District Judge.*

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Supreme Court of Idaho
Filed
May 22 1931
CLAY KOELSCH,
Clerk

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Petition for Rehearing.

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To the Honorable, The Supreme Court of the State of Idaho:

Your petitioner, American Surety Company of New York, respondent in the above cause, respectfully petitions this Honorable Court to grant a rehearing in said cause and as a basis for such petition your petitioner earnestly submits that this Court in its decision filed herein on May 2, 1931, erred in the following respects:

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I.

The gist of the decision is that where a judgment is entered against A and S from which both appeal but only S gives an undertaking to stay proceedings against it pending the appeal, the trial court may, after the Supreme Court has set

aside the judgment against S, enter judgment against the surety under Section 7155, without notice, upon failure of *A* to pay the judgment as against him within 30 days after the filing of the remittitur. In so holding, we think the Court erred because:

(a) The trial court had no jurisdiction over the person of the surety, for the latter had *consented* to judgment against it only in the event *S* failed to pay the judgment against it if affirmed on
197 appeal;

(b) When the judgment against S was set aside on appeal, the surety was no longer a party to the cause and the entry of judgment 30 days later, without notice, against the surety deprived it of its property without due process of law, and denied to it the equal protection of the law, contrary to the provisions of both the State Constitution and the Fourteenth Amendment to the Federal Constitution;

(c) Section 7155 was a part of the surety's
198 undertaking and the judgment against the surety must come strictly within the terms of that statute, otherwise it is obviously void for the surety is liable only in the event the appellant, in whose behalf the undertaking was given, fails to pay if the judgment against him be affirmed on appeal. When the judgment is set aside, the undertaking becomes *functus officio* and the surety may go its way. The original judgment against A and S was entered on May 31, 1928. The remittitur setting aside the judgment against S was filed in the District Court on May 22, 1930, and two days

later the trial court dismissed the action as against S. On June 23, 1930, the court *ex parte* and at appellants' request entered judgment against the surety (for S) for failure of *A* to pay the judgment against *him*. Clearly, the surety was not in court on June 23rd and the judgment against it was void for lack of jurisdiction of the person and for lack of jurisdiction to render the particular judgment awarded.

II.

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In entering judgment against a surety under Section 7155 C. S., the District Court was acting under a special statutory power resting solely upon the consent of the surety; its jurisdiction was limited and special and all elements necessary to confer jurisdiction must affirmatively appear from the record. Hence, this Court erred in holding that jurisdiction would be presumed and that it would not examine or construe the undertaking or determine whether the District Court had jurisdiction of the person or power to render judgment against the surety. 201

III.

The distinction made by this Court between "bonds" and "undertakings" on appeal is without precedent. Both are contracts of suretyship. Both are used interchangeably in the statutes and in the decisions of this Court and other courts. The ancient distinction has long since been eliminated. At common law a bond on appeal was an instrument under seal for a fixed penalty, while an undertaking was an unsealed contract for an

amount to be later ascertained and assessed, and where, as in Idaho, all distinction between sealed and unsealed instruments is abolished, the terms are used interchangeably, and the rule that one cannot recover against the surety unless he can also recover against the principal applies to both bonds and undertakings. Whether the principal joins or does not join, does not affect the surety's liability or the right of the obligee under Section 7155. The right to enter judgment against the surety under that Section depends upon the pro-
203 visions of the statute and not upon the ancient rule of the common law.

IV.

This Court erroneously assumed that the surety has the right of appeal from a judgment entered against it under Section 7155, whereas the law is well settled that one cannot appeal from a *consent* judgment and a judgment against a surety under that Section is a consent judgment except where the judgment goes beyond the surety's consent or the contract of suretyship, in which case it is void
204 as having been entered without jurisdiction—without notice, process or consent, and hence deprives the surety of its property without due process of law.

V.

Where judgment is entered without notice or process, or without consent or waiver (as in the case of undertakings on appeal), the Court is without jurisdiction of the person and judgments so entered are void and the mode of attack or pro-

cedure for review, sustained by the great weight of authority, is by direct attack or motion to vacate. This procedure calls the claimed error to the attention of the Trial Court and affords it an opportunity to correct any error committed and brings for review in the appellate court only such errors as the Trial Court has refused to correct after opportunity duly afforded. Such procedure rests on the basic, fundamental, and long established principles of appellate practice; and this Court erred in establishing a practice which affords the Trial Court no opportunity to correct 206
jurisdictional errors in *ex parte* judgments.

VI.

The decision of this Court deprives your petitioner of its property without due process of law and denies to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States, for it in effect holds that the judgment was entered against it under the undertaking given under Section 7155 and hence is a consent judgment from which no 207
appeal would lie, and it denies to petitioner the right to challenge it by direct attack or motion to vacate which is the uniform practice where judgments are void for lack of jurisdiction, and it is the practice that has been repeatedly sanctioned and approved by this Court and upon which decisions petitioner had a right to rely in this case.

VII.

This Court holds in substance that if the Trial Court in entering the *ex parte* judgment had pre-

sented to it a question that "challenged judicable inquiry", or if the undertaking "afforded color of legal right in appellants to judgment", then the surety should have appealed from the judgment, whereas if the question did not "challenge judicable inquiry", or if the undertaking did not afford "color of legal right in appellants to judgment", then the judgment would be void and the surety had no right to attack it by motion to vacate. Obviously, this injects an innovation into the law of appellate procedure. The surety must at its
209 peril select the right procedure and as a precaution it will both appeal from the judgment and also move to vacate it and then let this Court select which appeal it will entertain—either the appeal from the judgment or the appeal from the order vacating or refusing to vacate the judgment. Clearly, such practice would multiply appeals and the expense of litigation and create uncertainty, bewilderment and confusion. There will be much to condemn it and nothing to commend it. We think the Court erred in holding that the procedure in such cases must be deter-
210 mined by whether the record presents a "judicable inquiry", or "color of legal right"—phrases practically unknown to the law and incapable of such definite limitations as is required for the practical administration of justice.

VIII.

The Court failed to apply either the letter or the spirit of Section 9444, C. S., which provides that:

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> "The Compiled Laws establish the law of this State respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice."

The result of the Court's decision is to disregard justice and legal rights and to reverse the trial court without examining the record, although it is the identical record that would be before the Court if the matter came up on the appeal from 212
the judgment instead of from the order vacating the judgment. Obviously the decision sacrifices substance for form to the extent of holding the surety liable on an unconscionable *ex parte* judgment which the trial court had set aside because it was based on a bond which the surety had not given. This miscarriage of justice the Court justifies on distinctions and refinements which we think are not supported by authority and contrary to the mandate of the above statute that the provisions of the Code and the proceedings under it should be liberally construed with a view to 213
promote justice.

We will endeavor to present as briefly as possible some of the authorities sustaining the above points and petitioner's contention that this cause should be given further consideration by this Court.

214 *Petition for Rehearing.*

BRIEF OF THE AUTHORITIES.

The Court in Statutory Proceedings Has Limited Jurisdiction Which Must Affirmatively Appear From the Record.

The power to render a summary judgment against the surety on a supersedeas undertaking without notice rests upon the statute and the consent of the surety as expressed in its undertaking.

215 C. S., Sec. 7155;
California Code Civil Procedure, Sec. 942;
2 California Jurisprudence, 1084-1087;
4 C. J. 1305-1307.

In 2 Calif. Juris., pages 1085-1086, it is said:

> "A proceeding to enforce an undertaking by motion is a statutory proceeding and the course pointed out by the statute must be strictly followed."

216 See:

Hansen *vs.* Martin, 63 Calif. 282;
Reay *vs.* Butler, 118 Calif. 150, 50 Pac. 375;
Churchill *vs.* More, 7 Calif. App. 767, 96 Pac. 108.

The Court in exercising this special statutory power to render summary judgment without notice or hearing is not acting according to the course of the common law, its judgment is prop-

erly treated as that of a court of limited jurisdiction, everything necessary to give jurisdiction must appear by the record, and no presumptions can be invoked to supply any omissions from the record.

In the case of Wright *vs.* Atwood, 33 Ida. 455, 195 Pac. 195, this Court, at page 461 of the Idaho Report, definitely establishes the rule applicable to such cases as follows:

> *"When a court of general jurisdiction has special and summary powers wholly derived from statute, and not according to the course of the common law, and which do not belong to it as a court of general jurisdiction, its judgments are regarded and treated as those of courts of limited and special jurisdiction, and everything necessary to give jurisdiction must appear by the record; while everything will be presumed to be without jurisdiction which does not appear by the record to be within it.* (Morse v. Presby, 5 Fost. (25 N. H.) 302.)" (Our italics.) 218

In the case of Platts *vs.* Platts, 37 Ida. 149, 215 Pac. 454, an opinion rendered by Judge Givens as Commissioner, and approved by the Supreme Court, the above doctrine was again announced, and numerous authorities from various jurisdictions amply sustaining it were cited, and it is pointed out that no presumptions can be invoked to supply any omissions in the record in such cases. 219

It should be noted further that in entering a judgment pursuant to Section 7155 and similar Statutes, the power of the Court to do away with notice and hearing is based upon the consent of

the surety as evidenced by its undertaking and such consent derives its efficacy from the statute.

4 C. J., 1307;
2 Calif. Juris., 1086;
U. S. F. & G. Co. *vs.* Fort Misery Highway Dist., 22 Fed. (2d) 369;
Meredith *vs.* Santa Clara Mining Ass'n, 60 Calif. 617;
Gray *vs.* Cotton, 162 Pac. 1019;
Portland Trust Co. *vs.* Havely (Ore.), 61
221 Pac. 347.

These authorities, several of which are cited with approval in this Court's opinion, all hold that the execution of the statutory undertaking amounts to the entering of an appearance by the surety, making it a quasi party to the suit in which the undertaking is given, and further amounts to a consent that judgment may be entered against the surety upon the happening of the contingency specified in the undertaking. That the surety's appearance is a limited and special appearance
222 for the purpose and on the conditions named in the undertaking and no other is fully sustained by all these authorities and especially emphasized in Portland Trust Co. *vs.* Havely, *supra,* where the Court says at page 347:

> "Further than this, the surety, by entering his name upon the appeal bond, expressly covenants, in view of the statute, that judgment shall be entered against him if the appellant, his principal, fails to sustain the appeal. Beall *v.* New Mexico, 16 Wall. 535, 21 L. Ed. 292. By so doing, he makes himself a party to the record, and no further notice

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is necessary to sustain or establish the jurisdiction of the court in the entry of judgment or decree against him *according to the nature of his undertaking. He is as much bound by the judgment as is his principal.* Holbrook *v.* Investment Co., 32 Or. 104, 51 Pac. 451; Brauer *v.* City of Portland (Or.), 60 Pac. 378." (Our italics.)

It will be noted that the Oregon Court emphatically says that the surety's appearance in the case and his consent is "*according to the nature of his undertaking*", and further that the Court 224
says the surety "*is as much bound by the judgment as is his principal.*" In other words, the surety stands in the same position as his principal and cannot be held liable unless the principal is liable and if the principal is dismissed, the surety is dismissed.

In the present case as the lower court was not acting according to the course of the common law but in the exercise of this special and summary power wholly derived from statute, and as the surety's consent to jurisdiction was based solely upon the terms of its undertaking, everything
necessary to give the lower court jurisdiction must 225
affirmatively appear by the record. Everything which does not appear by the record will be presumed to be without jurisdiction and no presumptions can be invoked to supply omissions. The record upon which the validity of the judgment of June 23, 1930, must be determined consists of the judgment originally appealed from, the undertaking itself evidencing the surety's consent, the remittitur from this Court with the district court judgment entered pursuant thereto, and the judg-

226 ment in question. The surety's consent and submission to the jurisdiction is based solely upon its undertaking and unless that undertaking shows affirmatively that the surety consented to judgment upon the contingency that actually happened, the lower court lacked both jurisdiction of the person of the surety and jurisdiction and power to give the judgment rendered regardless of whether appellants, who were plaintiffs below, asked for it or not. Obviously, therefore, the jurisdiction of the district court to enter the judg-
227 ment cannot be ascertained without construing the undertaking, an assential part of the record on which that judgment is based, not merely for the purpose of determining whether it presented a "judicable inquiry" or "color of legal right" to the judgment, as suggested in this Court's opinion, but necessarily for the purpose of determining whether or not jurisdiction in the lower court exercising a special statutory power actually existed and the contingency stipulated in the undertaking as the basis of the surety's consent to jurisdiction had occurred.

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District Court Had No Jurisdiction of Person of Your Petitioner.

As already pointed out, the essential elements of jurisdiction must appear affirmatively in this special statutory proceeding or the judgment entered is void and jurisdiction of the person of your petitioner necessarily rests upon its implied consent as evidenced by its undertaking and in accordance with the nature thereof. Jurisdiction of the person of a defendant is universally recog-

nized as an absolute essential to a valid judgment and this Court so held in the opinion herein.

Ordinarily, jurisdiction of the person is obtained by service of process and in such cases a return of service makes a *prima facie* case of jurisdiction of the person. It is pointed out, however, in respondent's printed brief (pp. 64-71) that on a direct attack such as by motion to vacate a judgment, there is no presumption of jurisdiction of the person and even though the record purports to show such jurisdiction, the defendant may prove that jurisdiction of the person was not 230 in fact obtained as required by law. We need not repeat these authorities here as the question has been finally determined by this Court in Armitage *vs.* Horseshoe Bend Mining Co., 34 Ida. 179, 204 Pac. 1073, and in California by Norton *vs.* Atchison etc. Ry. Co., 97 Calif. 388, 30 Pac. 585, 32 Pac. 452.

In the case at bar the jurisdiction of the lower court over the person of your petitioner rested solely upon the consent evidenced by its undertaking and it is obviously impossible to determine the question without construing that undertaking 231 and determining its nature and extent. The lower court construed this undertaking for the first time on the motion to vacate the judgment and held the judgment void because it was not within the consent. This Court in the opinion herein disclaimed any intention or right to construe the legal effect of the undertaking to determine jurisdiction of the person and expressly states that it could not examine the undertaking and determine its legal effect as to whether by its terms petitioner became

232 a party liable for every part of the judgment appealed from or only in the event that such judgment should be affirmed against the Singer Sewing Machine Company. May we ask how this Court can determine whether the District Court had jurisdiction of the person of your petitioner unless it examines and construes the legal effect of the undertaking in this regard? Certainly it cannot be said that the District Court in this special statutory proceeding, where every essential to jurisdiction must affirmatively appear, had
233 jurisdiction because it entered the judgment of June 23, 1930. To do this we most respectfully suggest would be to deny petitioner the equal protection of the law and to deprive it of property without due process of law in violation of both the State Constitution and the Fourteenth Amendment to the Federal Constitution and surely the *ex parte* determination of the lower court on the motion alleged to have been made by appellants and as to which the record is silent, cannot be considered as outweighing the ultimate determination of the Court on the contested mo-
234 tion to vacate the judgment, at which time the same Judge who entered the *ex parte* judgment vacated it for lack of jurisdiction.

This Court, however, avoids the paramount issue of jurisdiction of the person of your petitioner by attempting a distinction between the legal effect of bonds and undertakings on appeal and by the broad assertion that the latter is a complete independent contract and the obligation of its maker is not collateral or secondary. Does the Court mean to say that because the undertak-

ing was "a complete independent contract" and the obligation of its maker was "not collateral or secondary", that it is not a contract of suretyship, and if not a contract of suretyship what kind of a contract is it?

The only authority cited for this entirely novel proposition is the California case of Moffat *vs.* Greenawalt, 27 Pac. 296, and a brief reference to that case is necessary. There, defendant had appealed from a justice court judgment and given a supersedeas undertaking with two individual sureties in which he did not join. Plaintiff excepted to the sufficiency of the sureties, they failed to justify, the appeal was dismissed, and plaintiff sued them on the undertaking. The sureties urged that as the statute provided that where they failed to justify, the appeal must be regarded as if no such undertaking had been given, they could not be held, and further urged that as the appeal was not effectual for any purpose, it could not have been dismissed. The Court held that the contingency on which they agreed to be bound was that the judgment be affirmed or the appeal be withdrawn or dismissed, and as the latter event had happened, they were liable for breach of the condition of their contract. The Court states in the course of its opinion that the undertaking was an original and independent agreement on their part and in legal effect was entered into by them with the plaintiff. This statement is true to the extent that for breach of the condition of the undertaking the makers may be sued without joining their principal and regardless of his solvency or whether execution has been returned unsatis-

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fied against him. But neither the statement of the Court in that case nor the opinion herein can repeal the positive provisions of the governing statutes that an undertaking on appeal is to be executed by "sureties" whose obligation is to pay the judgment if it is affirmed or the appeal dismissed, provided the appellant fails to pay.

Section 7155 C. S. provides that the execution of the judgment cannot be stayed "unless a written undertaking be executed on the part of the appellant, *by one or more sureties*". Similar
239 provisions are found in Sections 7154, 7156, 7158, 7159 and 7161. The California Statutes under which the Moffat case was decided are practically identical and it would be a rash assumption indeed to assume that either the California Court or this Court intended to do away with the express statutory provisions referred to.

The universal definition of a contract of suretyship is that it is a direct contract to pay the debt of another. As said in 4 Words and Phrases (2d) at page 803:

240 "'Suretyship' implies original undertaking and the measure of liability is the extent of the principal's liability."

See also:

8 Words and Phrases, pp. 6809-6813.

In Hoffman *vs.* Habighorst, 38 Ore. 261, 63 Pac. 610, 53 L. R. A. 908, it is stated:

"Everyone who incurs a liability in person or estate, for the benefit of another, without sharing in the consideration, stands in the

position of a surety, whatever may be the form of his obligation."

The same Court further states that it is not necessary or essential that the primary obligor join in the contract with the sureties and numerous authorities to sustain this point are quoted.

Clearly, the wording of our statutes that an undertaking is to be executed on behalf of the appellant by sureties means a contract of suretyship and nothing else. When the case of Moffatt *vs.* Greenawalt, *supra,* is examined, it is obvious 242
that the liability would have been enforced just the same if the judgment debtor had signed the undertaking. In that case the stipulated contingency had occurred and the makers of the undertaking were therefore liable. The obligation of the principal was evidenced by the judgment against him and he did not have to join in the undertaking.

The attempted distinction made in the same paragraph of the opinion between bonds on appeal and undertakings on appeal is insubstantial and imaginary and based no doubt upon the 243
argument advanced by appellants in their printed brief to this effect. None of the authorities sustain any such distinction, and courts, lawyers and laymen use the terms "bond" and "undertaking" interchangeably. In this connection, we wish to remind the Court that both in its opinion and in the printed brief of appellants in this cause the terms are also used interchangeably.

The word "undertaking" is thus defined in 2 Am. Eng. Enc. of Law, p. 98:

> "An undertaking is an engagement by one of the parties to a contract to the other and not the mutual engagement of the parties to each other."

In Scherer *vs.* Hopkins, 42 N. Y. St. Rep. 189, it is said:

> "An undertaking is but a simplified bond without a seal."

In Tenney *vs.* Taylor, 1 App. Cases D. C., 223,
245 it is said:

> "Unlike the ordinary appeal bond, which is an obligation under seal, with a fixed penalty, and a definite condition, limited to become effective or otherwise, by the determination of the appeal, the *undertaking* is without seal, or fixed penalty, and without condition, and is simply a promise or an assumption of liability to perform a judgment or to pay damages and costs." (Our italics.)

To the same effect see:

8 Words and Phrases, p. 7164;
246 1 Words and Phrases, pp. 832-834;
4 Words and Phrases (2d), p. 1053;
Wollenberg *vs.* Sykes, 49 Ore. 163, 89 Pac. 148.

The confusion in this matter arises from the fact that in California and states like Montana and Idaho, which have generally adopted the language of the California statutes, all distinctions between sealed and unsealed instruments are abolished, and at the same time the statutes expressly provide that undertakings on appeal shall

be executed on the part of the appellant, or on his behalf *by one or more sureties,* and do not require that they be executed by him, as he is already bound by the judgment.

In King *vs.* Pony Gold Min. Co. (Mont.), 62 Pac. 783, the Court points this situation out clearly at page 787:

> "*An undertaking to secure an appeal to the supreme court is technically a bond within the common-law definition, save that it is not under seal.* There is, however, no difference in this state between sealed and unsealed private writings. 248 It is not necessary at the common law that an instrument, to be a bond, must be executed by the person for whose default the obligors bind themselves to respond in damages, when he is not named as a party; nor is it essential that there be both principal and sureties. *Under our statutes an undertaking on appeal is a species of bond, and the two words are by judges, text writers, lawyers and laymen commonly used interchangeably.*" (Our italics.)

We will refer briefly to the other authorities on this alleged distinction cited by appellants in their 249 printed brief.

In *Ney* vs. *Orr*, 2 Mont. 559, the bond or undertaking was drawn to be executed by the principal but he failed to sign it. The instrument was, therefore, incomplete and the Court held the sureties not liable. Surely this case is no authority for the proposition that the surety may be liable though the principal is not.

In the King case, *supra*, the Court commented on the Ney case and expressly limited the effect of that decision to the particular facts.

250 In *Russell* vs. *C. B. & Q. Ry. Co.* (Mont.) 94 Pac. 501, erroneously cited in appellant's brief as "94 Pac. 488", it was held that a statute requiring official bonds to be executed by the principal and purporting to require all court bonds and undertakings to be so executed was unconstitutional, as applicable to appeal undertakings because the subject of appeal undertakings and court bonds generally was not within the title of the act nor germane to it.

In *Steele* vs. *Lovejoy* (Ill.) 17 N. E. 711, the
251 bond was executed by Claflin, the judgment debtor, as principal and Lovejoy as surety, and was a sealed instrument, hence it was clearly a bond. The statute of limitations on sealed instruments was ten years and other contracts five years, and defendant, Lovejoy, the surety, contended that as action on the judgment was barred the same rule should be applied to the bond. The Court held, however, that the bond was an agreement to pay the judgment, and the fact that the bond was also executed by the judgment debtor was not material. Being an express contract to pay the judgment if
252 the principal failed to do it, there was a clear liability and the statute of limitations as to sealed instruments was held to apply.

Clearly, none of these authorities lend the slightest color to the utterly indefensible proposition that an undertaking on appeal or a supersedeas undertaking is not a contract or suretyship to which the ordinary rules as to liability of principal and surety accordingly apply. If the condition of the bond or the condition of the undertaking, as the case may be, is broken, the surety is

liable, otherwise he cannot be held. It is wholly immaterial whether the instrument be an appeal bond under seal or an undertaking, the principal can join in either or fail to join, unless the particular statute requires his joinder, and the authorities which hold that no recovery can be had against the principal make no distinction whatever as to whether the instrument is under seal or not, or as to whether the principal signed it or not.

Thus, in the case of *First Nat. Bank* vs. *Rogers*, 13 Minn. 407, 97 Am. Dec. 239, cited at page 73 of respondent's brief, the instrument was evidently a bond under seal, executed by the debtor as principal and defendants as sureties. 254

In *Sharon* vs. *Sharon*, 83 Cal. 433, 23 Pac. 1102, it was an undertaking in accordance with the California statute. The Court says:

> "Tevis and Baldwin were the sureties on the undertaking given on the appeal from the judgment originally entered in this cause (75 Cal. 1, 16 Pac. Rep. 345), and when, on the 5th day of May, 1888, the plaintiff moved the court below for judgment against the present defendant, executor of the will of the original defendant, for alimony and costs, she also moved that the judgment be entered up as a judgment against the sureties, as well as against said defendant, and in entering the judgment it was so done. From the judgment so entered against them the sureties appeal. *So long as the plaintiff was not entitled to recover against the defendant, she could not recover against the sureties.* Parnell *v.* Hancock, 48 Cal. 452. On the authority of that case, and of Sharon *v.* Sharon, *ante*, 1100 (No. 12775, this day decided), the judgment en- 255

256 tered in this cause against Lloyd Tevis and E. J. Baldwin, June 23, 1888, upon the motion of the plaintiff, made May 5, 1888, is reversed, and the court below is directed to enter an order denying plaintiff's said motion." (Our italics.)

In Parnell *vs.* Hancock, 48 Cal. 452, the undertaking was evidently not executed by the principal. The Court says, at page 454:

257 "Before the defendants, as sureties of Porter, can be sued, Porter, their principal, must himself have become absolutely liable to pay the judgment in the County Court."

The Court then observes that plaintiff need not levy execution against the judgment-debtor before maintaining action against the sureties. It then continues, at page 455:

258 "But it is equally clear that, *unless the case be in such a condition as that the plaintiff might have issued an execution against the principal, had he desired to do so, he cannot proceed against the sureties on the appeal.* To hold that he could, would be to place the sureties in a position apparently less favorable than that occupied by their principal." (Our italics.)

In Burnham *vs.* Edwards (Okla.), 257 Pac. 788, cited at page 74 of respondent's brief, the Court refers to the instrument as a bond, and it was apparently executed by the principal, but the Court bases its decision on the general doctrine of suretyship and cites to sustain its ruling cases involving both bonds and undertakings.

In 2 Calif. Juris., pp. 1070-1071, in summarizing the California doctrine of liability upon undertakings on appeal, the author states:

> "It is thoroughly settled that the sureties on an undertaking on appeal or to stay execution may stand upon the strict letter of their contract. They can be held to no different contract from that into which they have entered * * *. *Any performance by the defendant that will discharge the judgment against him will operate as a discharge of the sureties, and any act of the plaintiff* 260 *that will release the defendant from the judgment will also release them, but so long as the plaintiff has the right to enforce the judgment against the defendant, he is entitled to enforce their obligation.*" (Our italics.)

Ample authorities to support these propositions are cited in the notes and among the recent California cases sustaining the doctrine that an undertaking on appeal is merely a contract of suretyship to which the ordinary rules applicable to principal and surety apply are:

> LaFleur *vs.* M. A. Burns Lmbr. Co., 188 Calif. 321, 205 Pac. 102; 261
> Hogan *vs.* Paddon (Calif.), 267 Pac. 392.

In both these cases the following statement is made:

> "The position of a surety on an undertaking on appeal is therefore similar to that of an ordinary surety on an obligation who has been regularly joined as a party defendant."

It follows from the above authorities that this Court was misled by the specious reasoning in

262 appellants' briefs into thinking that there was some fundamental distinction between a bond on appeal or any normal suretyship contract and an undertaking on appeal. The statute itself and the above authorities demonstrate conclusively that any such distinction is unreal and imaginary and further show that an undertaking on appeal or for a supersedeas is purely a contract of suretyship and that unless the plaintiff has a judgment which he can enforce against the principal, he is not entitled to judgment on the contract of the
263 surety. It is true that under the above authorities the undertaking may correctly be said not to be collateral or secondary in the sense that suit can be brought upon it or judgment entered without joining the principal and that it is unnecessary to show an unsatisfied levy of execution against him. Further than that the authorities do not go and they demonstrate absolutely that the contract is a contract of suretyship and the surety cannot be held liable unless the principal is liable, except possibly where the principal is released by operation of law as in the case of bankruptcy or
264 the statute of limitations.

On this phase of the case, therefore, we suggest most earnestly that this Court assumed that the lower Court had jurisdiction of the person of your petitioner without deciding it, that this Court could not find the existence of such jurisdiction without construing the undertaking and determining whether or not your petitioner's consent, as evidenced by the terms of its undertaking, conferred jurisdiction on the lower Court, that in this statutory proceeding jurisdiction of

the person cannot be presumed but must affirmatively appear from the record and accordingly the Court should grant a rehearing, construe the undertaking and determine whether or not the consent of the surety therein contained amounted to a consent to the entry of judgment in the event that the judgment originally appealed from should be affirmed as to Ed. Anderson and reversed as to Singer Sewing Machine Company.

The Judgment Was Void Because the Lower Court Had No Power to Render That Particular Judgment. 266

Like jurisdiction of the person, power to give the particular judgment rendered in this case depended upon Section 7155 C. S., and the consent of the surety in accordance with the nature of its undertaking, and like jurisdiction of the person, such power must affirmatively appear from the record in this special statutory proceeding and the existence of such power cannot be determined unless this Court examines and construes the undertaking.

267 Power to render the particular judgment awarded is absolutely essential to the validity of the judgment as shown in respondent's printed brief herein at pages 47-61, although it is frequently included under the general expression "jurisdiction of the subject-matter". This Court in a number of previous decisions has definitely established this rule and we respectfully submit that these decisions extending over a period of years should not be overruled by implication and by a mere assertion that the expression "power

or authority to render the particular judgment'' ''may be misleading''.

In its opinion the Court first substitutes ''jurisdiction of an issue of law or fact presented'' for ''power or authority to render the particular judgment''. It then quotes 1 Freeman on Judgments (5th Ed.), Vol. 1, pp. 444, 445, and says the phrase ''power or authority to render the particular judgment'' ''may be misleading'', but is clarified by the decision in Gile *vs.* Wood, 32 Ida. 752, 188 Pac. 36, to the effect that it is necessary
269 to the validity of the judgment that the Court

> ''have jurisdiction of the question which its judgment assumes to decide, *or of the particular remedy or relief which it assumes to grant.*''

Then the opinion refers to ''judicable inquiry'' and ''color of legal right'' and states that the undertaking cannot be examined to determine its legal effect and reaches a conclusion exactly opposite to that in Gile *vs.* Wood, *supra.*

Let us first consider the Gile case. There Wood,
270 a subordinate lienholder, was made defendant in a mortgage foreclosure under the general allegation that he claimed an interest, but no deficiency judgment against him was prayed for in the complaint. All the defendants had defaulted. The Court entered a personal judgment against Wood, the property was sold and a deficiency entered. Wood might have appealed because the judgment was erroneous as well as void, but he called the error to the attention of the District Court by motion to vacate; that Court vacated the personal judgment against him and plaintiff ap-

pealed. The lower court and this Court both held the judgment void in this regard. Why? Not because the plaintiff's attorney did not ask for it when he prepared the decree including that provision. No, it was vacated because the Court, although having jurisdiction of the person and the general subject-matter of foreclosure of the mortgage, had no power to render that particular judgment against Wood. This Court now says its former decision did not depend upon the proper construction of any document, but we ask how could this Court have ascertained that there was no allegation or prayer in the complaint authorizing the Court to enter a personal judgment against Wood without reading and construing the complaint? In the Gile case this Court did not decline to examine the complaint to see whether it "challenged judicable inquiry" or "afforded color of legal right". We submit that the analogy between the two cases is perfect. In the Gile case this Court construed the complaint on which the judgment vacated was based and held the judgment void for lack of power to grant it. Here the Court declines to construe the undertaking, which was the sole basis for the judgment, to determine whether or not the contingency therein stipulated, upon which judgment might be entered, had occurred. In both cases it is obvious that counsel for plaintiffs prepared the judgment and the lower court signed it as prepared. In neither case was there any issue of law or fact presented. In neither case was there any legitimate question presented to the Court for determination.

271 272 273

In its opinion herein, the Court frequently refers to plaintiff's motion for judgment. The rec-

274 ord shows neither written motion nor a minute entry of an oral motion, the judgment merely reciting "and the plaintiffs having moved for judgment". If an oral motion was made, which does not affirmatively appear from the record, it could not present an issue of law or fact because the hearing was *ex parte* and your petitioner had no opportunity to controvert plaintiff's claim. What is an issue and when does it arise? In Harris *vs.* San Francisco Co., 41 Calif. 393, at page 404, the Court makes this statement:

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> "An issue arises when a fact or conclusion of law is maintained by one party and controverted by the other in the pleadings."

Many similar definitions are found in 4 Words and Phrases, pages 3792-3, dating from Sir Matthew Hale and Blackstone. How could plaintiff by asking for judgment on the undertaking present an issue of law and how can this Court say that appellant's motion—if there was one—presented a legitimate question for determination without construing the undertaking? We there-

276 fore think it necessarily follows that if the decision in the present case is to stand, Gile *vs.* Wood must be overruled, and the same is true of a number of other decisions of this Court which, until the filing of the present opinion, were universally recognized as establishing the practice in such cases. The importance of the question to the lawyers and courts of the State compels a reference to these cases.

The other decisions cited by this Court on the question of jurisdiction, except for the case of

U. S. Nat. Bank *vs.* Eldredge, 49 Ida. 363, merely state the general requirements of jurisdiction of the person and jurisdiction of the subject-matter. The first case involving the power to render the particular judgment which we have found in Glover *vs.* Brown, 32 Ida. 426, 184 Pac. 649, in which the validity of a decree of distribution in the Probate Court was attacked by a suit in equity. Mr. Justice Budge, in giving the opinion of the Court, at page 436, says:

> "The principle, briefly summarized, may be 278
> stated thus: Even though a court has jurisdiction over the subject matter and the parties, *if it proceeds to dispose of matters over which it is not authorized to act or to grant relief of a character which it has no power to grant*, its judgment is in this respect void (Anthony *vs.* Kasey, 83 Va. 338, 5 Am. St. 277, at 278, 5 S. E. 176; Furman *v.* Furman, 153 N. Y. 309, 60 Am. St. 629, and note at pp. 643, 644, 147 N. E. 577; Day *v.* Micou, 18 Wall. 156, 21 L. ed. 861; *Ex Parte* Lange, 18 Wall. 163, 21 L. ed. 872, see, also, Rose's U. S. Notes; *In re* Klumpke's Estate, 167 Cal. 415, 139 Pac. 1062; Freeman on Judgments, 279
> sec. 116, p. 176.)" (Our italics.)

Chief Justice Morgan, concurring specially, laid down the rule in substantially the same language that he later used in Gile *vs.* Wood, *supra*, quoted in our printed brief at pages 48-49, and already discussed.

Wright *vs.* Atwood, 33 Ida. 455, 195 Pac. 195, was a collateral attack on the decree in a participation suit in the district court based on issues framed by the parties and which in the collateral

proceeding was claimed to be void because contrary to law. The opinion in which all five Justices of this Court concurred held the judgment was void for want of power to enter it. The Court says at page 461:

> "Judgments may be entered in cases where the court has undoubted jurisdiction over the subject matter, and of the parties, yet nevertheless may be void because the court decided some question which it had no power to decide, or granted some relief which it had no power to grant. *If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void, although it may have had jurisdiction over the subject matter and the parties.* (Freeman on Judgments, 4th ed., sec. 120c, p. 196; Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36; Bridges *v.* Clay Co. Supervisors, 57 Miss. 252; Seamster *v.* Blackstock, 83 Va. 232, 5 Am. St. 262, 2 S. E. 36; Anthony *v.* Kasey, 83 Va. 338, 5 Am. St. 277, 5 S. E. 176; Wade *v.* Hancock, 76 Va. 620; Fithian *v.* Monks, 43 Mo. 502.)" (Our italics.)

The Court then makes the extremely forcible statement on limited jurisdiction in statutory proceedings quoted at the opening of this brief and continues at page 462:

> "The extent and nature of a power depend upon the terms in which it is conferred, and it will not be enlarged because exercised by courts clothed with general jurisdiction; *and a judgment by a tribunal without authority, or which exceeds or lies beyond its authority, is necessarily void,* and may be shown to be so in collateral proceedings, even though it

be a court of general jurisdiction, because no authority derived from the law can transcend the source from whence it came; and the principle that a limited authority must appear to have been strictly construed, even when the acts of a superior court are in question, is well settled. (Richardson *v.* Seever's Admr., 84 Va. 259, 4 S. E. 712; Eaton *v.* Badger, 33 N. H. 228; Ransom *v.* Williams, 2 Wall. 313, 17 L. ed. 803; The Mary, 9 Cranch. 126, 3 L. ed. 678, see, also, Rose's U. S. Notes.)" (Our italics.)

284 In Miller *vs.* Prout, 33 Ida. 709, 197 Pac. 1023, the situation was generally similar to that in Gile *vs.* Wood, *supra*, and the same rule was followed.

In Blackaby *vs.* Dunning, 40 Ida. 20, 232 Pac. 566, the Court says:

> "It is elementary that observance or fulfillment of the requirements of due process are necessary to the validity of a judgment."

Why? Not because they are necessary to give "color of legal right", but because without them the Court has no power to render a judgment.

285 In Maloney *vs.* Zipf, 41 Ida. 30, 237 Pac. 632, cited by this Court in its opinion to sustain its conclusion, the Court, at page 33, says:

> "The words stricken from the judgment 'and that all acts and proceedings of defendant as executrix of said Will be, and the same are hereby annulled and set aside' was the entry of an order beyond what the court was authorized to make in that proceeding. It is necessary to the validity of a judgment that the court have jurisdiction of the question which it assumes to decide, or the particular

remedy or relief which it assumes to grant, *and when any portion of a judgment or decree is void on its face, because of going beyond what the court was authorized to decide, it may strike therefrom the void portion.* (Gile *v.* Wood, 32 Ida. 752, 188 Pac. 36; Miller *v.* Prout, 33 Ida. 709, 197 Pac. 1023; Wright *v.* Atwood, 33 Ida. 455, 195 Pac. 195.)" (Our italics.)

The following authorities quoted in respondents' printed brief to sustain the same proposition
287 are expressly approved in several of the above cases:

Freeman on Judgments (pp. 48 and 58);
Sharp *vs.* Sharp, 166 Pac. 175 (p. 49);
Standard Savings & Loan Ass'n *vs.* St. Anthony Co., 162 Pac. 451 (p. 50);
Sache *vs.* Gillette, 11 L. R. A. (N. S.), 803 (pp. 53-4);
Reynolds *vs.* Stockton, 140 U. S. 254, 40 L. Ed. 465 (p. 56).

In *Ex Parte* Lange, 18 Wall. 163, 21 L. Ed. 872,
288 cited by this Court in Glover *vs.* Brown, *supra,* the Court makes some very pertinent observations, saying at pages 878-9 of the Lawyers Edition Report:

"But it has been said that, conceding all this, the judgment under which the prisoner is now held is erroneous, but not void; and as this court cannot review that judgment for error, it can discharge the prisoner only when it is void.

But we do not concede the major premise in this argument. A judgment may be erro-

neous and not void, and it may be erroneous because it is void. The distinctions between void and merely voidable judgments are very nice, and they may fall under the one class or the other as they are regarded for different purposes. * * *

Unless the whole doctrine of our system of jurisprudence, both of the Constitution and the common law, for the protection of personal rights in that regard, are a nullity, the authority of the court to punish the prisoner was gone. The power was exhausted; its further exercise was prohibited. It was 290
error, but it was error because the power to render any further judgment did not exist.

It is no answer to this to say that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? *Because he had no power to render such a judgment.* So, if a court of general jurisdiction should, on an indictment 291
for libel, render a judgment of death, or confiscation of property, it would, for the same reason, be void. Or if, on an indictment for treason, the court should render a judgment of attaint, whereby the heirs of the criminal could not inherit his property, which should, by the judgment of the court be confiscated to the State, it would be void as to the attainder, because in excess of the authority of the court, and forbidden by the Constitution.'' (Our italics.)

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After pointing out that the same rule has been followed by that Court in the civil cases of *Bigelow* vs. *Forrest*, 9 Wall. 339, 19 L. Ed. 696, and *Day* vs. *Micou*, 18 Wall. 156, 21 L. Ed. 860, the Court continues at page 879:

> "But why could it not? Not because it wanted jurisdiction of the property or of the offense, or to render a judgment of confiscation, but because in the very act of rendering a judgment of confiscation it condemned more than it had authority to condemn. *In other*
293 *words, in a case where it had full jurisdiction to render one kind of judgment, operative upon the same property, it rendered one which included that which it had a right to render and something more, and this excess was held simply void.* * * *
>
> There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied." (Our italics.)

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This case demonstrates that in the opinion of the Supreme Court of the United States due process of law and equal protection of the laws require that in order to sustain the validity of a judgment, the Court must have power and authority to render the particular judgment it does render and that failure to recognize this limitation is a violation of the Fourteenth Amendment to the United States Constitution. Other authorities sustaining the general proposition as announced

by this Court in *Wright* vs. *Atwood, supra,* and other cases are:

Crew vs. *Pratt,* 119 Calif. 139, 51 Pac. 38 (Respondent's Brief, pp. 58-9);
Morawetz vs. *Sun Ins. Office,* 96 Wis. 175, 65 Am. St. Rep. 43;
Knickerbocker Trust Co. vs. *Oneonta Ry. Co.* (N. Y.) 94 N. E. 871.

The above cases and the authorities generally on the question of jurisdiction will be searched in 296
vain for any statement to the effect that the validity of a judgment depends upon a question which challenges "judicable inquiry" or affords "color of legal right". We have cited authorities from other jurisdictions to show that the considered decisions of this Court above referred to are right and sound, but independently of that they have definitely established rules of practice in this State which should not be lightly overturned and should clearly be followed under the doctrine of *stare decisis.* Further, even if this Court wishes to overrule its six previous decisions cited above, let 297
it do so expressly and not confuse the practice in this State further by saying that the rule adopted in those cases "may be misleading".

Let us consider for a moment the case of *U. S. National Bank* vs. *Eldredge,* 49 Ida. 363, 288 Pac. 416, in which so far as we have been able to ascertain the phrase "judicable inquiry" was used for the first time in legal history. We do not believe that the question whether or not a judgment rendered upon a complaint which does not state a cause of action is both void and erroneous, or merely erroneous, is greatly material in the pres-

298 ent case, but we do wish to direct the Court's attention to the fact that the decision rests apparently upon a misconception of the record in *Jensen* vs. *Gooch*, 36 Ida. 457, 211 Pac. 551, which it purports to distinguish, and the two decisions are squarely and unavoidably in conflict. In its opinion in the Eldredge case the Court, referring to the Jensen case, says:

> "The second syllabus * * * is misleading, for in that case the decision holds the district
299 court had jurisdiction to act, but as a matter of fact acted erroneously."

The record in Jensen *vs.* Gooch, *supra*, discloses that the appeal was from an order denying a motion to vacate judgment and there was no appeal from the judgment. Judgment was entered October 22, 1919; motion to vacate, July 14, 1920; order denying motion, October 26, 1920, and appeal was taken from the latter order on December 1, 1920—over a year after the entry of the original judgment. The only way in which the complaint in the action could be before this Court
300 was for the purpose of construction to determine whether or not it stated a cause of action and therefore rendered the judgment void. This Court holds expressly that the judgment was void, saying:

> "But in the face of the record the judgment is void because the complaint fails to state facts sufficient to constitute a cause of action against appellant."

It was therefore error in the opinion of this Court to refuse to set aside the judgment because

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this Court found upon a construction of the complaint that it did not state a cause of action and therefore the Court was without power to give the judgment rendered. In the closing paragraph of its opinion the Court says that the lower court had erred in overruling the demurrer and the case was remanded with leave to plaintiff to amend and apparently in U. S. National Bank *vs.* Eldredge, *supra,* this Court assumed from that statement that there was also an appeal from the judgment in the former case. The purpose of this statement in the Jensen case was apparently 302
to avoid any misunderstanding of the effect of its ruling by the lower court, but it would seem that the result was to create a misunderstanding in this Court some years later as to just what had been before it in the former case. As already stated, we do not think the inherent soundness of either of these decisions is greatly material in the present case, but we do wish to emphasize that they are hopelessly in conflict and both cannot be the law of this State.

We think it clear from the above authorities that power and authority to render the particular 303
judgment awarded was essential to its validity. It therefore follows that this Court could not hold the judgment valid, as it was entered in a special statutory proceeding in which no presumptions as to jurisdiction could be entertained, without examining the record and construing the undertaking on which the judgment was based to ascertain whether the lower court had power to enter the judgment which it did enter on June 23, 1930. To make this determination, the Court must at least examine, consider and construe the judg-

ment originally appealed from, the undertaking itself, the remittitur from this Court, the District Court judgment entered pursuant to such remittitur by a Judge other than the Judge who entered the judgment against the surety, as well as the judgment in question. If these documents when properly considered and construed and given their fair legal effect, fail to show affirmatively that the District Court had jurisdiction of the person of American Surety Company of New York on June 23, 1930, or fail to show that it had
305 power and jurisdiction to enter the particular judgment which it did enter, then said judgment was void and was properly vacated on respondent's motion.

We will not take the time to again analyze and construe the provisions of the undertaking which are discussed at length at pages 15-46 of respondent's printed brief. It would seem, however, from the majority opinion in this cause, that we failed to make our position clear to the Court as to the effect of the recitals in the introductory part of the bond. We discussed these recitals at pages
306 35-38 of the brief and then stated that while recitals could be considered in case of doubt, the language in the undertaking itself was so clear in its limitation to the Singer Sewing Machine Company alone that any quibbling on that point seemed unnecessary. We then quoted the language of the obligatory part of the undertaking and, as pointed out by Mr. Justice Budge in his dissenting opinion in the present case, that language affirmatively shows that the undertaking was given solely for the purpose of staying exe-

cution against Singer Sewing Machine Company and the Surety Company's liability could arise only in the event the judgment should be affirmed in whole or in part as against Singer Sewing Machine Company.

For these reasons we submit that this Court erred in holding that it could not construe the undertaking and also erred in not holding, after a construction of the record, that the judgment was void for lack of jurisdiction of the person and lack of power to enter the judgment. 308

The Judgment Was Not Appealable and Motion to Vacate Was Proper Remedy.

Throughout its opinion this Court assumes that your petitioner had a remedy by appeal from the judgment of June 23, 1930, and misconceived its remedy by moving to vacate the judgment. This is the first time, so far as we have been able to ascertain by a diligent search of the authorities, in which it has even been intimated by this Court that such a right of appeal existed and we are sure there is no decision to that effect. On the 309 other hand, the authorities establish clearly that *ex parte* judgments, summary judgments and consent judgments are not appealable and the judgment in question comes under each of these headings.

3 Corpus Juris, page 608, states:

> "Although it is sometimes otherwise under a statute, the general rule is that no appeal lies from an *ex parte* judgment or order, the proper remedy being to apply to the court to have such judgment or order set aside and

310 then, if the application is denied, to take an appeal from the denial."

In Wilson *vs.* Martin (Wn.), 86 Pac. 205, an appeal from an *ex parte* order, the Court says:

"The rule seems to be well established that an appeal will not lie from an *ex parte* order. The proper procedure is to move to vacate or set aside the order and appeal from the decision on the motion. 2 Ency. of Pl. & Pr., p. 96; 2 Cyc. 621, and cases cited. To the same
311 effect see Pacific Supply Co. *v.* Brand, 7 Wash. 357, 35 Pac. 72; Hall *v.* Skavdale, 21 Wash. 203, 57 Pac. 807."

In State *ex rel.* Norris *vs.* District Court (Minn.), 53 N. W. 1157, an appeal from an *ex parte* order, the Court says:

"That appeals will lie from such *ex parte* orders is opposed to the obvious reason upon which all purely appellate proceedings must be supposed to rest, namely, the necessity of an appeal to correct the error supposed to have been committed. The law attaches much
312 importance to the hearing of both the interested parties, not only as a matter of right to them, but as an aid to courts in the determination of matters brought before them. It is ordinarily to be supposed that a court which may have acted inconsiderately or erroneously upon a one-sided application would perceive and correct its error if the adverse party were heard. An examination of many decisions in this court shows that the general language of the statute declaring the right of appeal has been construed in a limited sense where there has been no real consideration in the court below of the matter in ques-

tion, with opportunity for the interested parties to be heard, and when it is to be presumed that upon hearing and consideration the court would correct any error which it may have committed."

In 3 C. J., 609, it is said:

"The general rule is that decisions on motions or summary applications cannot be thrown into the shape of records, and becomes the subject of revision in any other court by appeal or writ of error."

314

The authorities cited sustain this statement and a moment's reflection will indicate this rule must necessarily be applied to summary judgments on supersedeas undertakings. One of the conditions specified in the statute and required to be set forth in the undertaking is that the appellant shall not have paid the judgment within 30 days. Such payment would not normally be of record in the lower court. Suppose the judgment was in fact paid and the plaintiff nevertheless asked for judgment without notice. The surety in such a situation would have no opportunity to show payment and it would have no possible error to assign in this Court as ground for reversal. In Meredith *vs.* Santa Clara Mining Ass'n, 60 Calif. 617, the Court suggested that in such an event the sureties might have the judgment vacated or annulled and the present situation where the surety contends that the judgment was entered upon a condition not specified in the bond is quite similar.

315

On the question of consent judgments, the authorities are universal that they are not appealable if judgment is in accordance with the consent

316 *Petition for Rehearing.*

and the authorities cited in the Court's opinion herein on the necessity of notice, and at the opening of this brief abundantly demonstrate that the judgment against a surety on a supersedeas undertaking is a consent judgment.

The rule as to appeals from consent judgments is thus stated in 3 C. J., 671-2:

> "It is a well settled general rule, declared in some states by express statutory provision, that a party cannot complain of a judgment, order, decree, or ruling rendered or made, on
317 agreement or otherwise, with his express or implied consent, or appeal or sue out a writ of error to review the same, even though there has been an attempt to reserve the right to appeal."

Authorities to support this rule are cited from some 35 different states and the same rule was impliedly adhered to by this Court over thirty years ago in the case of Strode *vs.* Miller, 7 Ida. 16, 59 Pac. 893. At page 19 it is said:

> "It is contended by the respondent, however, that, the judgment being a consent
318 judgment, the appellants are estopped from complaining of it, and the appeal should be dismissed."

At page 20 the Court says:

> "The judgment not being warranted by the stipulation, the appellants are not estopped from appealing therefrom. We feel sure that the judgment in this case was entered through inadvertence. Appellants should have made application to the district court to vacate said judgment under section 4229 of the Revised

Statutes. Such application, we are satisfied, would have obviated the necessity of this appeal."

As already point— out, there seems to be neither a decision nor an expression of opinion from this Court upon the precise question, but the Supreme Court of California upon the identical statute, after some uncertainty in the earlier decisions, has definitely established the rule that an appeal will not lie. In the case of Duerr *vs.* Sloan (Calif.) 195 Pac. 475, at page 477, it is said:

"The appeal of the sureties from the judgment must be dismissed. By the stipulation which they made in the appeal bond they consented that judgment might be entered against them without notice if the defendant and appellant in the main suit failed to pay within 30 days after the filing of the remittitur in the superior court. Thus, at the expiration of 30 days from the date of the filing of the remittitur, the plaintiff in the main suit was entitled to the entry of judgment against the sureties, without notice to them, upon presentation of the record in the case showing that said judgment had not been paid within the time stipulated. Having consented to the entry of such judgment, the sureties cannot be heard in an appeal therefrom. Erlanger *v.* S. P. R. R. Co., 109 Cal. 395, 42 Pac. 31; Mecham *v.* McKay, 37 Cal. 154, 158; Judnick *v.* Judnick, 190 Pac. 480. Nothing herein is inconsistent with Hawley *v.* Gray, 127 Cal. 560, 60 Pac. 437. Where, as in that case, a judgment is entered prior to the expiration of the 30-day period, it is not a 'consent' judgment; that is to say, the judgment is not in accord with the consent given."

322 In addition to the cases cited in the above quotation, the following later decisions have applied the same rule, citing the earlier cases:

Hotchkiss *vs.* Superior Court (Calif.), 269 Pac. 524;
Roberts *vs.* Fitzgerald (Calif.), 271 Pac. 1110;
People *vs.* Aymer (Calif.), 276 Pac. 595, 596.

323 In the face of these authorities, how can it be said that your Petitioner had a right to appeal from the judgment of June 23, 1930? What record could it make on such an appeal, and what error could it assign? The only contingency upon which an appeal would lie would be that the judgment was not in accordance with the consent of the surety. In that event the judgment would not only be erroneous, but wholly void for lack of jurisdiction of person of the surety and lack of power to render the particular judgment against it, and admittedly could be vacated on motion. This procedure is eminently proper because it
324 calls the claimed error to the attention of the trial court and affords it an opportunity to correct the mistake. Further, it gives the surety a chance to make its record and being a special order after judgment made on notice and hearing, either party aggrieved thereby may appeal and have his rights finally determined. This procedure has the approval of this Court in the case of Strode *vs.* Miller, 7 Ida. 16, 59 Pac. 893, already cited. There a judgment had been entered by stipulation. Appellant contended that some of the terms of the

judgment were contrary to the stipulation and appealed. This Court held the judgment appealable because not warranted by the stipulation and then suggests the proper practice in the following language at page 20:

> "We feel sure that the judgment in this case was entered through inadvertence. Appellants should have made application to the district court to vacate said judgment under section 4229 of the Revised Statutes. Such application, we are satisfied, would have obviated the necessity of this appeal." 326

On principle, that case is exactly on all-fours with the case at bar. There the district court entered judgment upon stipulation. Here it entered judgment of the assumed consent of Petitioner in its undertaking. There this Court held the judgment void because it exceeded the terms of the stipulation and stated that application to vacate should have been made to the trial court. Here application to vacate was made to the trial court in accordance with the practice established since 1900 because the judgment exceeded the consent given by your petitioner in its undertaking, 327 and the trial court vacated the judgment on that ground. But on the judgment creditor's appeal in the present case, we now find this Court reversing the rule of practice suggested in Miller *vs.* Strode and denying your Petitioner the right to have its consent construed because Petitioner followed the procedure that the Supreme Court suggested in the former case. In that case this Court did not deny relief because it thought the procedure by motion preferable. It granted the re-

lief and gave its suggestions as to the proper practice. In the present case the substance of the Court's holding is that if the application of plaintiffs for judgment challenged "judicable inquiry" or "afforded color of legal right", your Petitioner should have appealed from the judgment, while otherwise the judgment would be void and the surety could only attack it by motion to vacate. This leaves a surety in such cases in the position where it must select the proper procedure at its peril, forcing it to take both horns of the dilemma
329 and adding to the bewilderment and confusion created by the use of such general and indefinable terms as "judicable inquiry" and "color of legal right". We earnestly urge, therefore, that the procedure suggested by this Court in Strode *vs.* Miller should be adhered to in order that litigants may not be deprived of their substantial rights because this Court may change its views upon mere technical details of procedure.

In connection with this matter of procedure, we also submit that the contentions elaborated at length in the printed briefs of appellants to the
330 effect that judgments can only be vacated when absolutely void or under a procedure authorized by express statute, rest upon the constitutional and statutory provisions in California by which terms of court are abolished, and is not even applied in that jurisdiction where the judgment is void in fact but not void on the face of the record, nor where there has been some inadvertence or irregularity in entering the judgment or a violation of stipulation, agreement or consent.

In 14 Calif. Juris., p. 1009, it is pointed out that under the common law and in California before the constitutional and code changes abolishing terms of court, a court of general jurisdiction had complete control of its entire proceedings during the term and might change, modify, amend or strike out from its judgments as it deemed necessary and proper during the term, even after the entry of final judgment. The early law on this point is discussed at length by the court in Wiggin *vs.* Superior Court, 68 Calif. 298, 9 Pac. 646. 332
It is obvious that in this State where terms of court are requested by both the Constitution and the Statute, the common law rule applies.

In 14 Calif. Juris., p. 1019, the contention made by appellants is disposed of thus:

> "It has been said that aside from the power granted by this Section of the Code (corresponding to our Section 6726), a judgment may be vacated on motion only when it is void on its face. But this is not true, as it is settled that a lack of jurisdiction may be shown on motion though the judgment is regular on its face. * * * " 333

At pages 1019-20 it is stated:

> "Independent of statutory provisions the court has power to correct mistakes in its proceedings, and to annul within a reasonable time, orders and judgments inadvertently made. Where the judgment of a court has been deliberately exercised in a cause and a final result reached as a conclusion thereof, there are good reasons why it should not be disturbed except by the formal methods prescribed by statute; but rulings, orders and

> even judgments, inadvertently made, are not the result of judgment but of oversight, neglect, or accident and are subject to correction by the judge or court making them."

It is thus clear that regardless of whether or not absence of "judicable inquiry" or "color of legal right" rendered the judgment strictly void, the trial court on the motion of your petitioner, made 3 days after the entry of judgment and prior to the expiration of the term of court, had
335 full power to vacate that judgment entered without notice or hearing and purely *ex parte*, provided it found the consent given in the surety's undertaking did not justify such judgment.

Denial of Constitutional Rights.

The effect of the opinion in this case is to deprive your petitioner of its property without due process of law and to deny to it the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United
336 States. Jurisdiction of the person of a defendant and power to render the particular judgment awarded are essential elements of due process. The only theory upon which the summary judgment authorized by Section 7155 C. S. can be justified is that a judgment entered in accordance therewith is based on the consent of the surety as evidenced by its undertaking. If the judgment is in accordance with that consent, no appeal will lie. If, on the other hand, as contended by your petitioner, the judgment is not within the consent

or in accordance with the nature of its undertaking, the trial court had neither jurisdiction of the person nor power to enter judgment against it and yet this Court denies your Petitioner the right to make a direct attack upon such judgment by motion to vacate, which is the recognized mode of procedure in attacking void judgments, and a procedure that has been repeatedly sanctioned and approved by this Court and upon which your petitioner had a right to rely.

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Judgment Contrary to Equity and Good Conscience.

One of the grounds of your petitioner's motion to vacate the judgment was that it was contrary to equity and good conscience and in closing the argument on this petition we feel justified in urging upon this Court that it has a right to consider the equities in this case and that to permit the judgment entered in the lower court against the American Surety Company of New York to stand and to be enforced, is contrary to good conscience 339
and equity. We feel justified in urging this upon the Court in view of our statute, Sec. 6591, C. S., which provides that all distinctions between suits in equity and actions at law are abolished and furthermore provides that in all matters not regulated by the code wherever there is a variance between the rules of equity and the rules of law that the rules of equity shall prevail, and under Section 9444, C. S. If, as a matter of fact, an examination of the undertaking in question, and

340 applying thereto the legal principles of construction, show clearly and beyond question that it was given to stay execution against the Singer Sewing Machine Company alone and that its only object and undertaking was to pay any judgment, damages or costs awarded against the Singer Sewing Machine Company, then to force it to pay the judgment affirmed against defendant Ed Anderson, who is a stranger to its obligation and for whom it never assumed any liability, is such a
341 gross miscarriage of justice as will shock the judicial conscience. If, after such full consideration of the undertaking in question, this Court can fairly say that it is properly interpreted to include the payment of any judgment affirmed against the defendant Ed Anderson, we have nothing more to say. If, however, on the other hand, as we earnestly urge is true, such examination will show that it did not obligate itself to pay anything by reason of the affirmance of the judgment against Ed Anderson, then we urge the Court in good conscience and equity that it cannot permit
342 its decision as now written to stand. We cannot believe that a court is ever called upon to sacrifice justice to form or to permit a technicality in procedure to deprive an individual of his rights and property, when justice and equity is shocked by the result. We urge that this view should appeal to the Court with great force in view of the provisions of Section 9444, C. S., establishing the rule for the construction of the Compiled Statutes, to-wit:

> "The compiled laws establish the law of this state respecting the subjects to which

they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice."

It will be noted that the Legislature in fixing this rule for the construction of statutes not only provided that the provisions of the statutes are to be liberally construed "to promote justice", but that all proceedings under these statutes shall be liberally construed "to promote justice".

This instruction of the Legislature that the statutes and the proceedings thereunder shall be liberally construed "to promote justice" is given greater force in this particular case when we consider that the district court, in acting under the provisions of C. S., Sec. 7155, and entering judgment against the respondent *ex parte* and without notice, was acting, not under its general jurisdiction conferred by the Constitution and after notice to the respondent and giving it a chance to be heard as in a regular proceeding, but was acting in a special proceeding provided by the statute without notice and without giving the respondent a chance to be heard and that its jurisdiction in so acting was limited and special, and that any jurisdiction that it might have had over the respondent and any jurisdictional power it had to enter judgment must be found in the terms of respondent's obligation in the undertaking in question and the consent which the respondent gave therein. 344 345

Finally, we urge that only justice can be done by the Court giving the record in this case full consideration and giving a legal construction of the undertaking in question. If the Court by such

proceeding finds that the American Surety Company undertook to pay any part of the judgment affirmed against the defendant Ed Anderson, well and good. If the Court finds that it did not undertake to pay the judgment or any part thereof if affirmed against defendant Ed Anderson, and affirms the order vacating judgment, then justice has been done and the plaintiffs and appellants have received no injury.

For these reasons, we respectfully submit that the Court should grant a rehearing in the above case.

Respectfully submitted,

RICHARDS & HAGA,
MARTIN & MARTIN,
Residence: Boise, Idaho,
Attorneys for Petitioner.

Service of the above and foregoing Petition for Rehearing and receipt of a copy thereof is hereby admitted this 22nd day of May, 1931.

JAMES F. AILSHIE, JR.
J. R. SMEAD
Residence: Boise, Idaho
Attorneys for Appellants

BOISE, IDAHO, June 3, 1931.

Court met pursuant to adjournment.

Present: Associate Justices BUDGE, GIVENS, VARIAN and MCNAUGHTON.

The following proceedings were had:

VIVIAN F. BALDWIN *et al.*, Appellants, 350

v. No. 5653

ED. ANDERSON *et al.*, Respondents.

In this cause counsel for respondents having heretofore filed petition for rehearing, and the Court having fully considered the same, on this day it was ordered that said petition for rehearing be and the same is hereby denied. 351

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Clerk's Certificate.

I, CLAY KOELSCH, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the foregoing printed pages numbered from 1 to 117, inclusive, constitute a true and complete transcript of the record and proceedings had in said Court in the case of Vivian F. Baldwin and E. R. Baldwin, Appellants and Ed. Anderson and American Surety Company of New York, Respondents, number 5653, as the same remain of record and on file in the Supreme Court of Idaho.

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IN TESTIMONY WHEREOF I have hereunto subscribed my name and the seal of said Supreme Court of Idaho at Boise, Idaho, this day of September, 1931.

(SEAL)

CLAY KOELSCH
Clerk of the Supreme Court of
the State of Idaho.

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SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed Aug. 29, 1931

On application of the American Surety Company of New York by William Marshall Bullitt, its Counsel, it is ordered that the time within which it may file its petition for a Writ of Certiorari to review a judgment of the Supreme Court of Idaho in the case of Vivian F. Baldwin and E. R. Baldwin, Appellants and Ed Anderson and American Surety Company of New York, Appellees, No. 5653, wherein the opinion was filed by the Supreme Court of Idaho on May 2, 1931, and the petition for rehearing was denied June 2, 1931, be and the same hereby is extended for the period of sixty days from and after September 1, 1931.

Dated August 27, 1931, Chatham, Mass.

Louis D. Brandeis, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 25, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Idaho is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.